Supreme Court, U.S.
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No. 03 906

IN THE
Supreme Court of the United States

Richard O'Brien,

Petitioner

vs.

City of Hackensack

Respondent

ON A PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael P. Hrycak
Counsel of Record

Law Office of Michael P. Hrycak
316 Lenox Avenue
Westfield, New Jersey 07090
(908) 789-1870

QUESTIONS PRESENTED

1. Petitioner asks this Court, in light of its decision in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), to specify what, if any, evidence beyond the false and pretextual reasons asserted by a public employer for terminating an employee after a course of discriminatory conduct need to be proffered by the undisputably rehabilitated employee to establish liability under the ADA for his wrongful termination and loss of career as a firefighter? And should the employer have to prove the specific reasons relied upon as the basis for termination?

2. Should a public employee, dismissable only for cause, have a constitutionally protected property interest in their tenure and be protected from deprivation of due process in his termination in view of Board of Regents of States Colleges v. Roth, 408 U.S. 564, 578 (1972), Perry v. Sindermann, 408 U.S. 593, 602-603 (1972), Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985)? Did the fact of no *ex parte* finding of probable cause due to the underlying offense charged was not indictable, create the risk of erroneous deprivation of due process rights as explained in Gilbert v. Homar, 520 U.S. 924, 935 (1997)?

PARTIES TO PROCEEDING

Petitioner - Richard O'Brien

Respondent - City of Hackensack, New Jersey, with no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 22

INDEX OF APPENDICES

Appendix A - Judgment, dated April 17, 2003, and issued in lieu of a formal mandate on July 1, 2003, before Honorable Barry and Rosen, Circuit Judges, Pollak, District Judge (sitting by designation), affirming Judgment of District Court entered May 8, 2002, and Opinion filed April 17, 2003.

Appendix B - Denial of Sur Petition for Rehearing En Banc, filed June 23, 2003, before Honorable Scirica, Chief Judge, Sloviter, Nygaard, Alito, Roth, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Rosenn,, Circuit Judges, and POLLAK, District Judge.

Appendix C - Order by Honorable Joel A. Pisano, District Judge, District of New Jersey, dated May 8, 2002, granting defendant's motion for summary judgment, denying plaintiff's motion for partial summary judgment as moot, and closing case, and Opinion, dated May 6, 2002.

TABLE OF AUTHORITIES

CASES

Board of Regents of States Colleges v. Roth, 408 U.S. 564 (1972) 17, 19

Daines v. Texas Department of Protective & Regulatory Services, 164 F.3d 277 (5th Cir. 1999) 11

FDIC v. Mallen, 486 U.S. 230 (1988) 20

Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997(en banc) 10

Gilbert v. Homar, 520 U.S. 924 (1997) 19, 20

Golaine v. Cardinale, 142 N.J.Super. 385 (Law Div., 1976)..17

Hodgens v. Gen. Dynamics Corp., 144 F.3d 151 (1st Cir. 1998) 11

Manning v. Chevron Chemical Co., LLC., 332 F.3d 874 (5th Cir. 2003) 11

Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078 (10th Cir. 1994) 10

Mathews v. Eldridge, 424 U.S. 319 (1976) 19

Matter of Cahill, 245 N.J.Super. 397 (App.Div. 1991) 16

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)...8

Mogull v. CB Commerical Real Estate, 162 N.J. 449 (2000)11, 12

Perry v. Sindermann, 408 U.S. 593 (1972) 17

Peters v. Lincoln Elec. Co., 285 F.3d 456 (6th Cir. 2002)....10

Price v. Federal Express Corp., 283 F.3d 715 (5th Cir. 2002) 11

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133

(2000) 8, 10, 11

Register v. Lloyd McCorkle Training School, 92 N.J.A.R.2d 697 (CSV, 1992) 15, 16

Salley v. Circuit City Stores, Inc., 160 F.3d 977 (3d Cir. 1998)6

Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000) 10

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).....9

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 9

Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999). 11

Troutman v. East Jersey State Prison, 93 N.J.A.R.2d 710 (CSV, 1993) 17

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 8, 10

Wallace v. O.C. Tanner Recognition Co., 299 F.3d 96, (1st Cir. 2002) 11

Wells v. Colorado Dept. of Transp., 325 F.3d 1205 (10th Cir. 2003) 8, 9

Zapato-Matos v. Reckitt & Colman, Inc., 277 F.3d 40 (1st Cir. 2002) 11

STATUTES AND RULES

29 U.S.C. § 794(a) 2

29 U.S.C. § 794(d) 3

42 U.S.C. § 12102(2) 2

42 U.S.C. § 12111(8) 2

42 U.S.C. § 12112(a) 1

42 U.S.C. § 12114(a) 2

42 U.S.C. § 12114(b) 2

42 U.S.C. § 12132 2

N.J.A.C. 4A:2-2.3(a)6 6

N.J.A.C. 4A:2-2.5(a)(1) 20

N.J.A.C. 4A:2-2.5(a)(2) 21

N.J.A.C. 4A:2-2.5(d) 21

N.J.A.C. 4A:2-2.6 18

N.J.A.C. 4A:2-2.7(a) 20

N.J.A.C. 4A:2-2.7(a)(1) 20

N.J.S.A. 2C:1-4b 15

N.J.S.A. 2C:35-10(a)(4) 15, 21

N.J.S.A. 2C:36A-1 21

N.J.S.A. 2C:51-2c 5

N.J.S.A. 10:5-1 16

NJAC 4A:2-2.6 18

OTHER

Congressman Rangel, Chairman, House Select Committee on Narcotics, Cong. Rec. (H2443-2444), May 17, 1990 7

Senator Kennedy, Cong. Rec. (S 10774-10775), September 7, 1989 8

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit appears at Appendix A is unpublished.

The Opinion of the United States District Court, District of New Jersey, appears at Appendix C is unpublished.

JURISDICTION

The jurisdiction of the District Court was invoked under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et.seq. and the Rehabilitation Act, 29 U.S.C. §§ 791 et.seq., and under 28 U.S.C. § 1331. The judgment of the United States Court of Appeals for the Third Circuit was entered April 17, 2003. The Court of Appeals denied a timely petition for rehearing on June 23, 2003. On September 22, 2003, Justice Souter signed an Order extending time for filing this petition for certiorari to and including November 20, 2003. The jurisdiction of This Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title I of the ADA provides in pertinent part:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.42 U.S.C. § 12112(a) (2000).

Title II of the ADA provides in pertinent part:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132 (2000).

The ADA defines a "qualified individual with a disability" as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8)

A "disability" is defined by this statute as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual, " or "a record of such impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(2)

The ADA specifically prohibits employers from discriminating against drug addicted employees who have sought rehabilitation and are no longer using drugs. 42 U.S.C. § 12114(b)

The ADA provides that a "qualified individual with a disability' does not include an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a)

The Rehabilitation Act provides in pertinent part:

No otherwise qualified individual with a disability in the United States, ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... 29 U.S.C. § 794(a) (2000)

The Rehabilitation Act provides further that

the standards used to determine whether this section has been violated in a complaint alleging employment discrimination

under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d)

STATEMENT OF THE CASE

This matter concerns the efforts of Richard O'Brien, a firefighter for the City of Hackensack, to secure the assistance of his employer in maintaining his rehabilitation from a cross addiction to drugs and alcohol. Instead, his employer ensured that he stayed in unpaid status for the next two and one half years (excepting two months) until it could terminate him.

O'Brien was a firefighter for the City of Hackensack from 1989 to 1995 with no serious disciplinary proceedings and positive evaluations. (App. A, pg. 4) His department head, Chief Richard Johnson was notified by O'Brien that he had a substance abuse problem and successfully sought treatment in mid-1994, "and was, by late 1994, no longer abusing drugs and alcohol." (Id.)

However, medication prescribed after emergency room treatment in November, 1994 due to a line of duty injury "had the unexpected consequence of precipitating anew O'Brien's drug abuse problem." (App. A, pg. 5) After missing numerous days of work, he notified Chief Johnson that he had a problem and requested assistance. Chief Johnson advised him in December 1994, when he sought leave, to stay at home. At a meeting in early January, 1995, he ordered O'Brien to undergo drug testing, for which he tested positive for drug use. Johnson ordered O'Brien to produce medical documentation regarding his condition and treatment.

Subsequently, Chief Johnson issued a department wide order advising that O'Brien was not allowed in any firehouse because disciplinary charges were pending. At the March 29, 1995, disciplinary hearing, among other findings, the City Manager found that some of his absences and failure to attend Fire Department-ordered medical evaluations were due to his enrollment in an inpatient drug treatment program. Due to his actively seeking treatment (with several negative drug tests), the City Manager found that New Jersey law protected his addiction status as a handicap and converted the discharge into a 60-day suspension without pay (Id.)

O'Brien appealed the decision (New Jersey Merit System Board never heard the appeal due to subsequent

October, 1995 settlement) based upon documentation he submitted evincing successful treatment (including inpatient), negative drug tests, and an independent assessment indicating a recommendation that O'Brien continue his participation in Narcotics Anonymous (Pl. brf. 6,7) "O'Brien doubted whether more time off work would be necessary or helpful to his continue recovery and he expressed particular concern about his ability to finance the drug treatment ordered by the City Manager. (App. A, pg. 6)

The City expected O'Brien to reimburse the expense of the 28 days of inpatient treatment, knowing by memorandum from their own benefits representative that there was a 20 day limit. The personnel director also advised the City Manager that the health insurance provider determined he was not a candidate for in or out-patient treatment (Pl. brf. 6). As a result the "City Manager and the City's attorney engaged in internal discussions regarding whether it was appropriate to require inpatient treatment and whether the City might reimburse some of O'Brien's treatment expenses. As a result, a revised plan was tentatively set forth which included some city financial support for O'Brien's rehabilitation. There is no evidence that the revised plan ever received final approval from the City or was tendered to O'Brien..." (App. A, pg. 6)

At the time O'Brien's suspension was to end, the City issued another disciplinary notice June 20, 1995 for his alleged plea of guilty to attempted theft of a spare tire (at the time of arrest). However, the City conducted a hearing on August 3, 1995 with no result because the charge had been dismissed by the Municipal Court Judge on July 6, 1995 (Pl. brf. 9) During that time, the City attempted to remove him from his position in accordance with N.J.S.A. 2C:51-2, but made no findings due to the statute requiring reinstatement to his position upon the judge's dismissal of the charges, N.J.S.A. 2C:51-2c[1] (Pl. brf. 9) After the August 3, 1995 hearing the City again issued a disciplinary notice alleging O'Brien failed to "attend all of the required rehabilitation programs." (App. A, pg. 6)

Upon the dates set for hearing this charge in September, 1995, the City engaged in settlement discussions due to O'Brien filing charges with EEOC (and New Jersey

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[1] ...restored, if feasible to his office, position or employment with all the rights, emoluments and salary thereof from the date of forfeiture.

Division of Civil Rights) "alleging discrimination based upon his drug-addiction status." (Id.) In return for O'Brien dismissing these charges and the previous appeal of his March, 1995 hearing, the City agreed to reinstatement. At the time of the agreement being made in October, 1995, O'Brien had been in unpaid status for eleven months, as a result he agreed to plead guilty to the conduct unbecoming a public employee charge as a result of the tire theft charge in June, 1995 resulting in the unpaid time off being converted into suspension without pay. He also agreed to continue outpatient treatment for six months and drug testing.

O'Brien continued attending Alcoholics Anonymous, and although the City agreed to secure and fund the outpatient treatment, it never did and he was awaiting notice from a program he contacted himself, when he was subjected to charges stemming from an arrest for possession of .33 grams of burned marijuana cigarettes after a traffic stop in December, 1995. O'Brien submitted a negative drug test taken shortly after the arrest and the drug charges were dismissed. After a disciplinary hearing held in March, 1997, the City issued a decision in May, 1997 terminating him as of December 12, 1995 based upon conduct unbecoming a public employee for the arrest, as well as insubordination for failure to enroll in outpatient therapy. He subsequently filed the instant suit.

The District Court opined that summary judgment was appropriate for the City based upon O'Brien's failure to establish a *prima facie* case on two grounds: (1) O'Brien was not a qualified individual in accordance with the ADA because he continued "to use and possess illegal drugs until his final suspension from the fire department in December 1995. "(App. C, pg. 25); and (2) he was not terminated due to his disability but as a result of (i) his conduct unbecoming a public employee for two arrests, June 1, 1995 for stealing a spare tire and December 9, 1995 for possession of a controlled dangerous susbstance, and (ii) insubordination based upon his failure to enroll in an inpatient drug treatment program as mandated by the City after his March, 1995 disciplinary hearing. O'Brien also asserted a Privacy Act claim under 5 U.S.C. § 551, which the Court dismissed because it only applies to actions by the federal government. The Court relied upon the Third Circuit's "distinction between adverse employment action due to "addiction-related misconduct" and an adverse employment action "due to the disability of an addiction." Salley v. Circuit

City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998). (App. A, Pg. 27)

The United States Court of Appeals for the Third Circuit upheld the District Court's affirmance of summary judgment on a narrower ground:

> No one could reasonably conclude, on this record, that O'Brien was terminated for his addiction, rather than for the misconduct of drug use and possession. The record reveals that the City clearly terminated O'Brien in response to his arrest for possession of drugs, which is a permissible reason under the ADA. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998).

The Court opined that O'Brien "must show animus directed strictly toward the plaintiff's addiction status." (App. A, pg. 8). "After showing some tolerance for O'Brien's addiction in the past, the City promptly terminated him after the arrest. It acted in accordance with N.J.A.C. 4A:2-2.3(a)6, which permits the discipline of public employees for "[c]onduct unbecoming a public employee." Arrest on drug possession is plainly unbecoming conduct. (Id.)

REASONS FOR GRANTING THE PETITION

The ADA provides protection for individuals who are handicapped, as well as those with a disability stemming from drug and alcohol abuse. This protection is critical for two reasons: (1) once the individual comes to the realization that a drug and/or alcohol problem exists, they can either attempt to cope with it on their own, an endeavor that requires considerable determination and effort, including extra effort to continue to function fully in their respective employment, or they should be able to notify their employer that a problem exists and realize support and/or accommodation in their rehabilitation effort, which scenario should result in a greater chance of success; and (2) if the individual cannot expect the protection from adverse employment action from their employer, they will continue in their employment with the addiction disability and it will be only a matter of time when this will result in their failure to function effectively:

> This bill strikes a delicate balance. It recognizes the need to protect employers, workers and the public from person whose current illegal drug use impairs their ability to perform a job and whose employment could result in serious harm to the lives and property of others. At the same time, the bill recognizes that treatment for those in the grips of substance abuse is not the only compassionate thing to do but an essential component of a comprehensive attack on drugs. Treatment can save the lives of individual abusers, and it can also return them to productive roles in society.... By providing protections against discrimination for recovered substance abusers and those in treatment or recovery who are no longer engaged in illegal drug use, the bill provides an incentive for treatment. Under this bill, no one who seeks treatment and overcomes a drug abuse problem need fear discrimination because of past drug use. Congressman Rangel, Chairman, House Select Committee on Narcotics, Cong. Rec. (H2443-2444), May 17, 1990

For public employees such as a firefighters, police officers or emergency medical technicians, who are the first

responders in emergencies engendering the trust and faith of the public when they are in dire straits, attempting to function with such a disability because they cannot rely upon the protection of the ADA could result in injury to the public as well as themselves.

Additionally, the ADA protection encompasses those individuals who recover from drug problems without formal treatment:

> This protection ... extends those who overcome such [drug] problems without the help of formal treatment - including individuals who are able to stop using illegal drugs on their own or through participation in self-help groups such as Narcotics Anonymous. In addition, the Act's protections extend to rehabilitated individuals who no longer use illegal drugs, but who continue to participate in drug treatment programs... or continue to receive after-care counseling or participate in self-help groups. Senator Kennedy, on of the bill's sponsors, Cong. Rec. (S 10774-10775), September 7, 1989

Petitioner urges the Court to revisit Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), to resolve what appears to be a continuing "conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." [citations ommitted] at 140, and to decide whether discrimination cases which ultimately focus on whether the employer's reason for termination was discriminatory and proceed without going through the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and instead focus on the ultimate question of discrimination *vel non*, as pointed out by this Court in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-15 (1983).

The concurring opinion in Wells v. Colorado Dept. of Transp., 325 F.3d 1205 (10th Cir. 2003) explains correctly that Courts need to focus on the ultimate question of discrimination *vel non* in discrimination cases:

> If it is inappropriate to concern ourselves with whether the plaintiff has proved a prima facie case when we review a judgment after a trial in which the employer introduced evidence of its reasons for adverse actions against the plaintiff, it should also be inappropriate to worry about the prima facie case when we review a summary-judgment proceeding in which the employer proffered such evidence. Id. at 1228

The confusion inherent in determining whether discrimination motivated the employer stems from this Court's previous decision limiting the employer's evidentiary burden to that of persuasion in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) by explaining that:

> ...the defendant's explanation of its legitimate reasons must be clear and reasonably specific... Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant will normally attempt to prove the factual basis for its explanation... we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking in factual basis is a pretext. Id. at 258.

By requiring employers to meet the burden of persuasion, rather than merely production of the legitimate, non-discriminatory reason for its adverse employment action, the concern articulated by Justice Souter in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993): "The majority fails to explain how the plaintiff, under its scheme, will ever have a "full and fair opportunity" to demonstrate that the reasons not articulated by the employer, but discerned in the record by the factfinder, are also unworthy of credence." Id. at 534, would be answered. Thereby obviating the plaintiff's need to disprove conceivable explanations for the employer's actions suggested by the evidence, Id. at 537.

As this Court explained in Reeves, 530 U.S. at 141: "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness'testimony as to the employer's mental processes,"

(citing Aikens, 460 U.S. at 716) and held that: "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 148. By requiring the employer to produce and persuade the fact finder why it acted as it did against the employee, the fact finder would not have to rely on trying to find some other non-discriminatory reason.

The permissive holding in Reeves therefore has resulted in the interpretation that plaintiffs still need to satisfy the rebuttal framework, such as the 6th Circuit established in Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078 (10th Cir. 1994): "This circuit... has held that "[t]he jury may not reject an employer's explanation [of its action] unless there is sufficient basis in the evidence for doing so." Id. at 1083, as explained in Peters v. Lincoln Elec. Co., 285 F.3d 456 (6th Cir. 2002) that plaintiff cannot rely simply upon its prima facie case to prove that employer's articulated reason did not actually motivate the discharge "... but must, instead, introduce additional evidence of [prohibited] discrimination. Id. at 472. The Second Circuit also interpreted Reeves as not answering yes or no to whether when a plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, non-discriminatory explanation for its action, by noting:

> It is arguable that the Supreme Court's reading of *Fisher* [v. Vassar College, 114 F.3d 1332 (2d Cir. 1997(en banc)] was inaccurate. We read *Fisher* as consonant with *Reeves*: Both hold that the quantum of evidence needed to sustain an inference of discrimination is the same as that needed to sustain the ultimate inference in any other civil case... Schnabel v. Abramson, 232 F.3d 83, 89 n. 5 (2d Cir. 2000)

This type of reasoning has resulted in other circuits also deciding that Reeves requires that case by base analysis:

> *Reeves* reinforced the prior law in this circuit that even if the trier of fact disbelieves the nondiscriminatory explanation given by the employer, the trier is not compelled to find that the real reason was

> discrimination. Reeves at 530 U.S. at 147, 120 S.Ct. 2097: Thomas [v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999)] 183 F.3d at 57. That is because the ultimate question is not whether the explanation was false, but whether discrimination was the cause of the termination. We have adhered to a case by case weighing. Zapato-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 45 (1st Cir. 2002)

However, another 1st Circuit opinion referes to "... the proposition that a court assessing discriminatory motive may consider "the specific sequence of events leading up to the challenged decision." Wallace v. O.C. Tanner Recognition Co., 299 F.3d 96, 102 n. 5 (1st Cir. 2002) (citing Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168-69 (1st Cir. 1998)). The 5th Circuit also questions the impact of Reeves where the plaintiff must still face the "clearly more qualified standard" for employment discrimination, Price v. Federal Express Corp., 283 F.3d 715, 723 (5th Cir. 2002), with the recent concurring opinion asking whether Daines v. Texas Department of protective & Regulatory Services, 164 F.3d 277 (5th Cir. 1999) still survives Reeves, Manning v. Chevron Chemical Co., LLC., 332 F.3d 874, 884-5 (5th Cir. 2003).

Recently, the New Jersey Supreme Court decided that "Given the confusion that often results when the first and second stages of the McDonell Douglas test goes to the jury, we recommend that the court should decide both those issues." Mogull v. CB Commerical Real Estate, 162 N.J. 449, 473 (2000), which resulted in revised Model Civil Jury Charges be adopted in discrimination cases:

> The *McDonnell Douglas* test was devised by the United States Supreme Court in the context of summary judgment practice, and was adopted as a means to determine whether a plaintiff had sufficient circumstantial evidence to raise a triable issue of fact on the issues of discrimination to withstand a motion for summary judgment. As the New Jersey Supreme Court observed in *Mogull*, however this framework has "consfuse[d] lawyers and judges, much less juries who do not have the benefit of extensive study of the law on the subject." *Mogull*, 162 N.J. at 471. Accordingly, the New Jersey Supreme Court recommended that the first

two stages of the *McDonnell Douglas* test be decided by the court, and not the jury. Id. at 473.

In this matter, the Third Circuit opined that "in order to make out a prima facie case for discrimination in such cases, the plaintiff must show animus directly strictly toward the plaintiff's addiction status." App. A, pg. 8 This requires plaintiff's proof of discriminatory intent, although O'Brien produced a deliberate course of discriminatory conduct by his employer that started when he requested assistance with his cross addiction to alcohol and drugs after prescribed medication by the emergency room physician caused the uninteded side effect of his involvement with drugs and alcohol. The Court found that O'Brien "had not been involved in any serious disciplinary proceedings [prior to 1994]" App. A, pg. 4. However, the City found that:

> A public employee serving as a firefighter is entrusted daily with the personal safety of the citizens he serves and his fellow firefighters. The past history of Firefighter O'Brien's disciplinary problems and drug abuse, while tragic, are undisputed. The City has met its legal responsibilities over this period of time, to proactively, and with the expenditure of significant public funds, assist Firefighter O'Brien on the path of rehabilitation. This has not been successful. The fact that sixty (60) days after returning to work (after a seven month period of suspension/leave of absence due to a drug abuse problem) Firefighter O'Brien is again found to be in possession of a controlled dangerous substance, speaks volumes on the seriousness of this situation. May 14, 1997 opinion by City Manager LaCava

This opinion contains disputed facts that could not and should not be resolved at summary judgment. There was no past history of O'Brien's disciplinary problems or drug abuse: (1) He pleaded guilty to conduct unbecoming a public employee for his June 1, 1995 arrest for attempting to steal a spare tire. Despite the fact that the offense was for a tire less than $200, which makes it a disorderly persons offense (New Jersey does not use the terminology misdemeanor and felony, but disorderly persons offenses are misdemeanors), New Jersey

law does not allow its criminal code to penalize an individual for attempt to commit a disorderly persons offense[2]. O'Brien's plea of guilty was at the police station after the arrest for the purposes of setting bail, when he finally appeared before the Municipal Court Judge on July 6, 1995 the matter was dismissed. His previous disciplinary proceeding finding him guilty on April 19, 1995 for (i) chronic absenteeism, (ii) abandoning position, (iii) conduct unbecoming a public employee, and (iv) insubordination, stemmed from the time that he was ordered to stay at home by Chief Johnson after admitting to a drug abuse problem in December, 1994. (2) O'Brien had no record of drug abuse except for his admitting to a problem and his sole positive drug test, at the time he was asking for assistance, in January, 1995. (3) The City did not meet any of its obligations in assisting O'Brien with his rehabilitation, quite the opposite, when O'Brien was enrolled in inpatient rehabilitation at the beginning of February, 1995 (which was approved by the City's representative and confirmed by an internal memorandum issued before the City Manager's April 19, 1995 opinion) he was found guilty of absenteeism, abandoning his position, conduct unbecoming a public employee and insubordination while he was undergoing treatment. The Court found that "The drug arrest charges were later dismissed, and O'Brien submitted a drug test, from very shortly after his arrest, showing no signs of current drug use. Also, despite the City's promise to help find a program for him, O'Brien had contacted an outpatient program solely through his own efforts, and was awaiting notice fromthe program as to when he was to begin treatment." App. A, pg. 7 The City had agreed in its October, 1995 settlement agreement:

> We recognize -- the City recognizes that Mr. O'Brien's insurance may or may not cover formalized outpatient therapy programs, and we understand that he is without independent funds to place himself in such a program. We are going to try to get our own City Hospital to approve such a plan, but in the meantime, if that doesn't work, Mr. O'Brien is going to continue going to his programs with Al-Anon or Ar-Anon.
> MR. O'BRIEN: AA.

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[2] see State v. Clarke, 198 N.J.Super. 219, 225-226 (App.Div. 1985)

> MR. GUIDA: AA, and will report monthly to Chief Johnson to show attendance at those programs, weekly attendance at those programs. In the event that we do or we are able to get a formalized progam which is beneficial to Mr. O'Brien, Mr. O'Brien has agreed to participate in that program as long as he is not financially bound to those programs, and that's understandable. So we are going to try through our own hospitalization to try to resolve something along those lines. If we can't, then we can't. (October 13, 1995 transcript, labor attorney Guida, and O'Brien, Ja195:14-196:11)

At his termination hearing on Mayrch 27, 1997, the City personnel director admitted that none of the funds appropriated for O'Brien's treatment were ever spent (March 27, 1997 transcript, pg. 96). As a result, there were no expenditures of funds by the City. (4) All of O'Brien's treatment and his continuing attendance at Alcoholics Anonymous meetings were accomplished on his own initiative. It is undisputed that he was and stayed alcohol and drug free, as his numerous negative drug tests confirmed, therefore his rehabilitation was successful. (5) The City Manager noted parenthetically that O'Brien was suspended for drug abuse, the record speaks for itself that he was suspended for disciplinary charges brought by the City, none of which found that O'Brien was abusing drugs. As a matter of fact, his drug previous drug abuse problem would never have been known without his admitting it to Chief Johnson when he sought help in December, 1994. And finally, (6) O'Brien was never found to be in possession of a controlled dangerous substance, not before or after his admitting to a drug abuse problem. His December, 1994 arrest was premised upon Officer Casper of the Berfenfield Police Department stopping him while he was driving someone else's car in a snow storm for allegedly having his driver's license suspended. This charge was dismissed at the outset of the Municipal Court proceedings. In a search incident to arrest, two burnt marijuana cigarettes were found in a jacket inner pocket (Bergenfield Police Department Arrest Report-indicating O'Brien was unemployed, former Hackensack Fire Department, dated December 9, 1995, Ja206; incident report dated December 11, 1995, indicating stop at 21:15:43 and one

male to P[olice] H[eadquarters] FTA warrants at 21:19:22, Ja207; Arrest report narrative, dated December 9, 1995, Ja208) The two burnt marijuana cigarette butts were found in a cigarette box in the jacket O'Brien put on when exiting his vehicle, which was searched outside of his view in the Bergenfield Police headquarters. The total weight of these consumed cigarettes was .33 grams (1 ounce equals 28 grams, therefore .33 grams is .0118 of an ounce). He was charged with N.J.S.A. 2C:35-10(a)(4), possession of less than 50 grams (disorderly persons offense - N.J.S.A. 2C:1-4b specifies that disorderly persons offenses "are petty offenses and are not crimes within the meaning of the Constitution...Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime.") The consumed butts could not have been consumed by O'Brien, as he "submitted a drug test, from very shortly after his arrest, showing no signs of current drug use." (App. A, pg. 7)

The Third Circuit did not find that O'Brien's termination for insubordination due to failure to attend inpatient treatment was warranted. The Court did find his arrest for possession of CDS did warrant termination. However, the New Jersey Merit System Board reiterated its policy in Register v. Lloyd McCorkle Training School, 92 N.J.A.R.2d 697 (CSV, 1992):

> Under these circumstances, the Board FINDS that a disciplinary penalty is not warranted. In making this determination, the Board is mindful that employee rights must be equitably balanced with the State's legitimate interest in public safety and in promoting and maintaining a drug-free work place. The harsh consequences of removal would not only terminate appellant from his current position but would also preclude him from future public employment, thus punishing him perpetually for voluntarily admitting to his drug problem and seeking treatment. In so doing, it would also discourage other persons with a drug problem from seeking treatment and rehabilitation. The board also notes that in *In the Matter of Daniel Cahill, Firefighter, City of Newark, N.J.Super. (App.Div. 1991)*, the court found that an addiction, habituation, or dependency which results from use of drugs renders a person handicapped and therefore

> entitles him to protection under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Accordingly, the court concluded that an employer must accommodate an employee handicapped by substance abuse by affording him an opportunity for rehabilitation.
>
> The Board recognizes that drug abuse is a serious offense. This is especially true in a correctional facility where for reasons of safety and security it is of paramount interest that correction officers are neither using nor under the influence of drugs. However, an effective drug policy should encourage voluntary rehabilitation efforts by employees. This is especially true in the circumstances of the instant case in which appellant sought treatment on his own initiative, and their is no evidence of his prior drug use having interfered with his performance of his duties whatsoever. Id., Register, at 698

The New Jersey Merit System Board policy mandates progressive discipline in matters such as O'Brien's and would not have upheld his termination for the misdemeanor arrest:

> The purpose of the civil service law is to provide public employees with job security and to protect them from arbitrary and unreasonable employment decisions. In New Jersey, a system of progressive discipline has evolved in response to these goals. Progressive discipline assures public employees that they will be given some opportunity to improve their job performance before they forfeit their positions. On the other hand, immediate removal of a permanent career employee may be appropriate and need not be preceded by less severe penalties. See *Golaine v. Cardinale, 142 N.J.Super. 385, 395-96 (Law Div. 1976)*. However, an employee's conduct must be egregious before the policy of progressive discipline is circumvented. Troutman v. East Jersey State Prison, 93 N.J.A.R.2d 710, 712 (CSV, 1993)

Therefore, the termination of O'Brien on this charge is both a

disputed issue of material fact which precludes summary judgment, as well as not supportable by New Jersey law.

O'Brien was deprived of his consitutionally protected property interest in his tenure as a firefighter by being terminated without due process, as mandated by Board of Regents of States Colleges v. Roth, 408 U.S. 564, 578 (1972); Perry v. Sindermann, 408 U.S. 593, 602-603 (1972).

For major discipline, the New Jersey Department of Personnel regulations require:

> (a) The hearing shall be held before the appointing authority or its designated representative.
> (b) The employee may be represented by an attorney or authorized union representative.
> (c) The parties shall have the opportunity to review the evidence supporting the charges and present and examine witnesses. The employee shall not be required to testify, but an employee who does testify will be subject to cross-examination.
> (d) Within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action. N.J.A.C. 4A:2-2.6

Hackensack conducted O'Brien's disciplinary hearing to terminate his employment on March 27, 1997 (Hackensack city manager's May 14, 1997 findings Ja230-235). The appointing authority produced one witness, personnel director Gordon Sieck, whose testimony consisted of describing disciplinary notices issued to O'Brien(pages 54 to 65), and labor attorney Raymond Wiss, Esq., reading excerpts of the Bergenfield Municipal Court proceedings transcripts into the record (pages 66-79), followed by cross examination (pages 79 to 95), with redirect (pages 95 to 96). Not a single fact witness was produced at the hearing regarding O'Brien's alleged CDS possession, although Hackensack's proffer at the beginning of the hearing by labor attorney Raymond R. Wiss, Esq. (upon presenting the transcript of the Municipal Court proceedings to

O'Brien's attorney for the first time) was that the Bergenfield police officers were going to testify. Notwithstanding this fact, city manager Lacava makes the following finding:

> I have reviewed this transcript. The proof of Firefighter O'Brien's guilt is overwhelming. Suffice it to say that Bergenfield Police Officer Casper's testimony is comprehensive and credible. He is a Police Officer who testified as to the reason for the motor vehicle stop; the arrest of Firefighter O'Brien; the subsequent search of Firefighter O'Brien's jacket; and the discovery of marijuana in Firefighter O'Brien's jacket. This is a witness with "no axe to grind" and surely no motivation to lie.
>
> Firefighter O'Brien, on the other hand, initially claimed that the substances (I note that it appears that trace amounts of cocaine were also found on Firefighter O'Brien at the time of the arrest. Since he was not charged with this additional offense in Municipal Court or in these proceedings, I will disregard such information) were "planted" on him by Officer Casper. Then during his testimony in Bergenfield Municipal Court he could not confirm or deny that the cigarette box containing the marijuana was in his jacket (as testified to by Officer Casper). I find neither of Firefighter O'Brien's "explanations" credible.
>
> Lacava May 14, 1997 findings, Ja234.

However, Officer Casper did not testify and the City Manager's finding of credibility was not based upon testimony but the Municipal Court transcripts, and O'Brien had no opportunity, as a result, to cross examine Officer Casper, although the adminstrative code provides that parties have a right to present and examine witnesses.

This Court was presented with the issue of whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay in Gilbert v. Homar, 520 U.S. 924 (1997). The Court noted that public employees who can be discharged only for cause have a consitutionally protected property interest in their tenure and

cannot be fired without due process, Board of Regents of States Colleges v. Roth, 408 U.S. 564, 578 (1972); Perry v. Sindermann, 408 U.S. 593, 602-603 (1972). It also identified three distinct factors that are balanced to determine what due process is constitutionally due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest. Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

As to the employees private interest in uniterrupted receipt of his paycheck, "So long as the suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial (compared to termination), and fringe benefits such as health and life insurance are often not affected at all... On the other side of the balance, the State has a signficant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers... The last factor in the *Mathews* balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and likely value of any additional procedures... Gilbert, at 931-33

The Court accepted that an *ex parte* finding of probable cause such as a grant jury indictment would provide adequate assurance that suspension was not unjustified. "It is true... that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for the present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted" Id. at 934 (citing FDIC v. Mallen, 486 U.S. 230, 240 (1988). The Court concluded by noting that "Once the charges were dropped, the risk of erroneous deprivation increased susbtantially, and ... there was likely value in holding a prompt hearing." Id. at 935, and remanded the matter for determination of whether petitioners violated due process by failing to provide a sufficiently prompt postsuspension hearing.

Id. at 936

The New Jersey Administrative Code for Department of Personnel mandates that when suspending an employee based upon criminal complaint or indictment, a Preliminary Notice of Disciplinary Action ("PNDA") must be served, N.J.A.C. 4A:2-2.7(a). Next, the employee may request a departmental hearing within five days of receipt of the Notice.. "limited to this issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment." N.J.A.C. 4A:2-2.7(a)(1) O'Brien's union requested delaying the hearing until his Municipal Court matter was resolved. However, immediate suspension was only authorized if

> it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. N.J.A.C. 4A:2-2.5(a)(1)

or if the employee is charged with a first through third degree crime, or a crime of the fourth degree on the job or directly related to the job, N.J.A.C. 4A:2-2.5(a)(2). O'Brien was charged with N.J.S.A. 2C:35-10(a)(4), possession of less than 50 grams (disorderly persons offense), and should not have been suspended immediately without pay. The drug charges were dismissed by way of conditional discharge, N.J.S.A. 2C:36A-1 on November 5, 1996. Chief Johnson received a letter from the union on November 21, 1996 advising that the charges were disposed of, and that reinstatement, back pay, seniority, and benefits were demanded. A fitness for duty hearing was requested by letter dated December 19, 1996. The City responded to neither request, instead issued another PNDA on February 6, 1997, three months after disposition, although the administrative code required an FNDA be issued upon disposition of any criminal complaint or indictment, N.J.A.C. 4A:2-2.7(b). A hearing is to be held within 30 days, N.J.A.C. 4A:2-2.5(d), which hearing was held March 21, 1997. Although the decision was to be made by the City within 20 days, the decision to terminate issued on May 15, 1997. Therefore, the City from December, 1994, through May, 1997 kept O'Brien in unpaid status for the entire time, less October through the first week in December, 1995 (which was the

result of the parties' settlement agreement). As a result, O'Brien lost his career as a firefighter and could not be employed in any other jurisdiction.

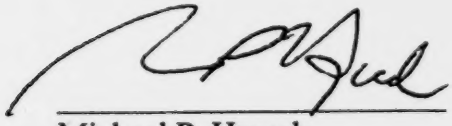
Therefore, both the grounds for the suspension as well as the conduct of the termination hearing and its findings are disputed facts by O'Brien and should not have been resolved on summary judgment due to evidence that O'Brien successfully sought rehabilitation, stayed alcohol and drug free and continued attending Alcoholics Anonymous meetings, as the parties' October, 1995 settlement agreement required. On the other hand, the City never met any of the obligations of its settlement agreement and continued to find a way to discipline O'Brien, resulting in termination. Petitioner contends that he has presented both direct and circumstantial evidence of discriminatory conduct by the City, thereby defeating summary judgment.

Should the actions of the City not be subject to challenge, the national implication to all public employees, especially those under great stress as first responders, is that ADA protection will not be afforded when they request treatment for addiction disabilities, thereby discouraging rehabilitation and affecting the safety of other public employees, as well as the public they protect and serve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Michael P. Hrycak

Date: November 20, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2614

RICHARD O'BRIEN,
Appellant

v.

CITY OF HACKENSACK,

Appeal from the United States District Court
for the District of New Jersey
(D.C.Civ.No. 98-cv-5728)
District Judge: Honorable Joel A. Pisano

Submitted Under Third Circuit LAR 34.1(a) April 10, 2003

Before: BARRY and ROSENN, Circuit Judges, POLLAK, District Judge[1]

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey

Appendix A

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[1] Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation

and was SUBMITTED on April 10, 2003.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered May 8, 2002, be, and the same is hereby AFFIRMED. Each side to bear itw own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: April 17, 2003

Certified as a true copy and issued in lieu of a formal mandate on July 1, 2003

Teste: s/Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2614

RICHARD O'BRIEN,
Appellant

v.

CITY OF HACKENSACK,

Appeal from the United States District Court
for the District of New Jersey
(D.C.Civ.No. 98-cv-5728)
District Judge: Honorable Joel A. Pisano

Submitted Under Third Circuit LAR 34.1(a) April 10, 2003

Before: BARRY and ROSENN, Circuit Judges, POLLAK, District Judge[2]

OPINION OF THE COURT

ROSENN, Circuit Judge:

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[2] Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation

I.

This appeal concerns whether the City of Hackensack ("City") violated the Americans with Disabilities Act and the Rehabilitation Act, by discriminating against Richard O'Brien because of his drug and alcohol addiction. O'Brien alleged in his complaint that the City had terminated him on the basis of a drug and alcohol addiction. He sought relief under the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. §§ 12101, et seq. and the Rehabilitation Act, 29 U.S.C. §§ 791 et seq.[3] The City filed a motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, which the District Court granted in its entirety. Accordingly, the court dismissed all of O'Brien's claims.[4] O'Brien timely appealed. We affirm.

O'Brien was a firefighter for the City of Hackensack from 1989 to 1995. Prior to 1994, he had received only positive evaluations from the Fire Department and had not been involved in any serious disciplinary proceedings. In mid-1994, O'Brien admitted to the head of the Fire Department, Chief Richard Johnson, that he had a substance abuse problem, and that he was seeking treatment for the problem. Johnson condoned O'Brien's efforts to seek treatment, and no disciplinary action was taken against him at that time. O'Brien successfully completed a substance abuse rehabilitation program, and was, by late 1994, no longer abusing drugs and alcohol.

However, in November 1994, a prescription medication, ordered by O'Brien's doctor, had the unexpected consequence of precipitating anew O'Brien's drug abuse

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[3]The Rehabilitation Act provides that "the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d); see Donahue v. Consolidated Rail Corp., 224 F.3d 226, 229 n.2 (3rd Cir. 2000). Therefore the analysis in this opinion focuses solely on discrimination under ADA standards, inasmuch as this analysis determines the disposition of both legal claims.

[4]O'Brien also sued under the Privacy Act, 5 U.S.C. §§ 551-552, which the District Court dismissed on summary judgment. However, O'Brien has not appealed the dismissal of this claim.

problem, which caused O'Brien to miss numerous days of work. During December 1994, O'Brien sought hospitalization for treatment. However, his insurance provider would not cover this service. In early 1995, O'Brien confessed a relapse to Johnson, who ordered that O'Brien be examined by the Hackensack City Physician and City Psychologist. Johnson subsequently heard allegations that O'Brien had appeared at fire stations apparently under the influence of drugs or alcohol. As a result, Johnson ordered O'Brien to stay away from the workplace. Later, at a meeting to discuss O'Brien's future in the Fire Department, Johnson asked O'Brien to undergo a drug screening. O'Brien tested positive for drug use.

After the drug results were known, Johnson preliminarily terminated O'Brien, subject to a disciplinary hearing, on the grounds that O'Brien had not provided medical documentation to vouch for numerous absences, that he had appeared at work apparently under the influence of drugs, and that he had refused to undergo the prescribed examinations by City physicians.

O'Brien contested most of the charges against him at a March 1995 disciplinary hearing before the City Manager. In his decision, the City Manager found that, although O'Brien had missed some days of work without leave and did come to work apparently under the influence of drugs or alcohol, these incidents were the result of his drug addiction. Similarly, his failure to appear for Fire Department-ordered medical evaluations was due to his enrollment in an inpatient drug treatment program. Thus, the City Manager held that his transgressions were substantially attributable to his addiction for which O'Brien actively was seeking treatment. Noting that addiction status was a protected handicap under New Jersey law, the City Manager converted the discharge to a 60-day suspension without pay. This afforded O'Brien an opportunity to fully rehabilitate. The City Manager conditioned O'Brien's return to work on his participation in a City-approved drug treatment program, including an inpatient care regimen, and his submission to periodic drug tests upon his return to work.

O'Brien appealed the City Manager's decision. O'Brien submitted documentation to the City suggesting that he was drug free and was no longer in need of the intesive drug treatment recommended by the City Manager. He asserted that, in February 1995, he had participated in a drug therapy

program, including inpatient care, and he presented drug testing results that showed he had been drug free since. O'Brien doubted whether more time off work would be necessary or helpful to his continued recovery, and he expressed particular concern about his ability to finance the drug treatment ordered by the City Manager. The City Manager and the City's attorney engaged in internal discussions regarding whether it was appropriate to require inpatient treatment and whether the City might reimburse some of O'Brien's treatment expenses. As a result, a revised plan was tenatively set forth which included some city financial support for O'Brien's rehabilitation. There is no evidence that the revised plan ever received final approval from the City or was tendered to O'Brien at this time.

In June 1995, O'Brien was arrested and pled guilty to the crime of stealing a tire. O'Brien was preliminarily terminated for this occurrence; however, the guilty plea was subsequently vacated and the disciplinary action against O'Brien was suspended pending further action on the criminal prosecution.

Later, in August 1995, O'Brien faced another disciplinary order of termination. This order charged him with disobeying the City Manager's orders by failing to attend all of the required rehabilitation programs. Around this time, O'Brien filed charges with the EEOC and the New Jersey Division of Civil Rights, alleging discrimination based upon his drug-addiction status. In October 1995, the parties settled the outstanding termination action against O'Brien on terms that would have O'Brien withdraw his pending EEOC and New Jersey complaints, and the court would order him reinstated, provided he remained alcohol-and drug-free and that he maintain enrollment in an outpatient treatment program for six months after his return to work. O'Brien would also agree to a suspension without pay, in addition to the earlier suspension levied for his 1995 charges, as punishment for the tire theft charges against him. The City agreed to help O'Brien secure and fund an outpatient therapy program. However, the City later shifted the burden back to O'Brien to find outpatient treatment on his own.

O'Brien returned to work in October 1995, and there is no evidence that he continued to use drugs over the next two months. In December 1995, O'Brien was arrested on charges

of possession of marijuana. The City again preliminarily terminated O'Brien on the grounds of conduct unbecoming a public employee, and failure to obey the order to undergo six months outpatient care, as specified in the earlier settlement of disciplinary charges against him. The drug arrest charges were later dismissed, and O'Brien submitted a drug test, from very shortly after his arrest, showing no signs of current drug use. Also, despite the City's promise to help find a program for him, O'Brien had contacted an outpatient program solely through his own efforts, and was awaiting notice from the program as to when he was to begin treatment. The City Manager heard his appeal of the preliminary discharge, and, noting the gravity of a drug offense shortly after O'Brien's return to work after suspension for drug abuse, issued a decision in May 1997 upholding the discharge, based on both the arrest and on his failure to undergo outpatient therapy. O'Brien subsequently filed the instant suit.

II.

Our review of a summary judgment motion is plenary. Only if there is no evidence from which a rational person could conclude that the plaintiff's position is correct should summary judgment be granted. Olson v. General Electric Astrospace, 101 F.3d 947, 951 (3d Cir. 1996).[5]

To set forth a prima facie case under the ADA, a plaintiff must show "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discriminatin." Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998). Here, O'Brien has failed to establish the third prong of the test. No one could reasonably conclude, on this record, that O'Brien was terminated for his addiction, rather than for the misconduct of drug use and possession. The record reveals that the City clearly terminated O'Brien in response to his arrest for possession of drugs, which is a

[5]The District Court exercised original jurisdiction pursuant to 28 U.S.C. § 1331. This court's appellate jurisdiction is proper under 28 U.S.C. § 1291.

permissible reason under the ADA. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998).

Where there exists a meaningful distinction between discrimination based on addiction status and discrimination based on work misconduct related to drug use is a debatable point. With respect to most other disabilities, a termination may be unlawful "if the employee's violation [of work rules] stems from his or her disability." where an employer can otherwise accommodate the disability. Id. However, "Congress has decided to treat drug and alcohol addiction differently from other disabilities by ensuring that employers do not have to go through the accommodation process in these cases." Id. Therefore, in order to make out a prima facie case for discrimination in such cases, the plaintiff must show animus directed strictly toward the plaintiff's addiction status. An employer need not show any tolerance for work-related problems that are a consequence of drug or alcohol use. Thus, termination based on drug possession and failure to accommodate drug-related misconduct are not violations of the ADA. Absent evidence that the employer was motivated by the employee's status, as opposed to mere drug use or possession, there can be no ADA discrimination claim. O'Brien has not demonstrated that the actions of the City were motivated by his status, rather than by his drug possession. Only when he was arrested for drug possession was he terminated. After showing some tolerance for O'Brien's addiction in the past, the City promptly terminated him after the arrest. It acted in accordance with N.J.A.C. 4A:2-2.3(a)6, which permits the discipline of public employees for "[c]onduct unbecoming a public employee." Arrest on drug possession is plainly unbecoming conduct.

O'Brien takes issue with the District Court's factual finding that he was currently using drugs at the time of his arrest; discharge for "current use" of drugs in unprotected under the ADA. The City was not motivated by O'Brien's actual use of drugs at the time of discharge, but by his possession of drugs and his arrest on a drug-related charge. These are valid bases on which to terminate an employee under the ADA, regardless of how one construes "current use." The third prong of the prima facie case of disability discrimination has not been met, and O'Brien's case fails as a matter of law. The judgment of the District Court will be affirmed. Each side

to bear its own costs.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Max Rosenn
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2614

RICHARD O'BRIEN,
Appellant

v.

CITY OF HACKENSACK,

Appeal from the United States District Court
for the District of New Jersey
(D.C.Civ.No. 98-cv-5728)
District Judge: Honorable Joel A. Pisano

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, ROSENN,[1], Circuit Judges, and POLLAK, District Judge[2]

(Filed Jun 23 2003)

Appendix B

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[1]Honorable Max Rosenn, Senior Circuit Judge, was a member of the original panel and voted as to panel rehearing only.

[2]Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation, was a member of the original panel and voted as to panel rehearing only.

SUR PETITION FOR REHEARING EN BANC

The petition for rehearing having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court:

s/ Max Rosenn
Circuit Judge

Dated: JUN 23 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CLOSED

Richard O'Brien Plaintiff, v. City of Hackensack Defendant.	Civil Action No. 98-CV-5728 (JAP) **ORDER**

For the reasons set foth in the Court's decision, dated May 6, 2002, Defendant's motion for summary judgment is granted. Plaintiff's motion is denied as moot. The case is closed.

s/Joel A. Pisano
Joel A. Pisano
U.S. District Judge

Orig; Clerk
cc: Magistrate Judge Arleo
All Parties
File

Appendix C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CLOSED

Richard O'Brien Plaintiff, v. City of Hackensack Defendant.	Civil Action No. 98-CV-5728 (JAP) **OPINION**

APPEARANCES:

Michael P. Hrycak, Esq.
316 Lenox Ave.
Westfield, NJ 07090
Attorney for Plaintiff

Raymond R. Wiss, Esq.
Wiss, Cooke & Santomauro
Three University Plaza
Suite 297
Hackensack, NJ 07601
Attorney for Defendants

PISANO, District Judge:

I. INTRODUCTION

Plaintiff Richard O'Brien ("O'Brien"), a former fire fighter, filed this lawsuit under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101- 12117, the Rehabilitation Act, 29 U.S.C. §§ 701-796, and the Privacy Act, 5 U.S.C. §§ 551-552, against his former employer, defendant City of Hackensack ("Hackensack"). Specifically, O'Brien, who filed the Complaint pro se but who has subsequently retained counsel, alleged that hackensack discriminated against him on the basis of his disability "[a]s specified in but not limited to the [ADA], Privacy Act, and the Rehabilitation Act." (Compl.)

This court exercises original jurisdiction pursuant to 28 U.S.C. § 1331. Pending before this Court are cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. Hackensack seeks summary judgment on all claims, whereas, O'Brien seeks partial summary judgment asking that the Court declare that O'Brien is a qualified individual with a disability.[1] (Pl. br. at 14) The Court decides these motion without oral argument pursuant to Fed. R. Civ. P. 78. for the reasons stated herein, the court grants hackesnack's motion for summary judgment because O'Brien cannot establish a prima facie case of discrimination. In addition, O'Brien's claim under the Privacy Act is dismissed because Hackensack is not a federal agency. Further, O'Brien's motion is denied as moot.

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[1]Hackensack filed a forty page reply brief without obtaining permission of the Court in violation of Local Civil Rule 7.2(b). That rule provides in pertinent part:

> Any brief shall include a table of contents and a table of authorities and shall not exceed 40 ordinary type or printed pages (15 pages for any reply brief submitted under L. Civ. R. 7.1(d) and any brief in support of a motion for reargument submitted under L. Civ. R. 7.1(g), excluding pages required for the table of contents and authorities. Briefs of greater length will only be accepted if special permission of the Judge or Magistrate judge is obtained prior to submission of the brief.

Accordingly, Hackensack's reply brief will be stricken from the record and will not be considered by the Court.

II. STATEMENT OF FACTS

Hackensack hired O'Brien as a firefighter in 1990. (Johnson dep. at 8) In June 1994, O'Brien told hackensack Fire Chief Richard Johnson ("Johnson") that he was experiencing problems related to excessive use of alcohol. (Johnson dep. at 9) Thereafter, In December 1994, O'Brien told Johnson that he was also using drugs. (O'Brien Dep at 18) At that time, O'Brien requested leave in an attempt to enter an inpatient detoxification program. (Tr. of March 29, 1995 at 150) However, since such a program was not covered by O'Brien's health insurance plan, and he was not financially capable of paying for such a program himself, he was unable to enroll.. (Tr. of March 29, 1995 at 150) As a result, on January 2, 1995, O'Brien met with Johnson to discuss his possible treatment and future with the fire department. (Johnson dep. at 20) At this meeting, Johnson requested that O'Brien undergo a drug test. (Johnson dep. at 20)

O'Brien submitted to a drug test on January 11, 1995, which determined that O'Brien had both cocaine and marijuana in his system. (def. ex. D) Thereafter, Johnson advised O'Brien, on January 26, 1995, that he needed to submit a letter from his personal physician explaining his drug treatment before he would be permitted to return to work. (Tr. of March 29, 1995 hearing at 29) Johnson sent O'Biren a letter dated January 30, 1995, advising him that his employment would be terminated if he did not provide a medical report by February 2, 1995. (def. ex. E)

On February 7, 1995 Dr. Sklar, O'Brien's physician, advised Johnson that he had been treating O'Brien for substance abuse since June 1994. Dr. Sklar noted that he had sent O'Brien to an outpatient clinic for substance abuse in November 1994, but O'Brien had apparently left that program. (def. ex. F)

On February 24, 1995, Johnson issued a Special order advising all fire department personnel that O'Brien was not permitted in the firehouse at any time. (Johnson dep. at 20) Thereafter, hackensack issued O'Brien a Preliminary Notice of Disciplinary Action ("PNDA") on February 26, 1995 alleging:

chronic absenteeism in violation of N.J.A.C. 4A:2-2.3(a)4[2]; abandoning of position in violation of N.J.A.C. 4A:2-6.2[3]; conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6[4]; and insubordination in violation of N.J.A.C. 4A:2-2.3(a)2[5]. (def. ex. G)

James LaCava ("LaCava"), Hackensack's City Manager conducted a hearing on these charges on March 29, 1995. Thereafter, on April 18, 1995, LaCava issued a written opinion sustaining the charges filed against O'Brien and holding that the termination of O'Brien's employment was warranted. LaCava explained:

> Accordingly, termination is warranted. However, I accept the conclusion that O'Brien is a handicapped person whose condition falls within the protection of the New Jersey Law Against Discrimination. I accept further that Mr. O'Brien's personnel file is free of prior disciplinary problems, and that he has been trying to deal with his drug abuse problem by seeking medical help and therapy. I also accept that two recent drug test were negative for drugs. Accordingly, I suspend the

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[2]N.J.A.C. 4A:2-2.3(a)4 provides "[a]n employee may be subject to discipline for:... 4. Chronic or excessive absenteeism or lateness.

[3]N.J.A.C. 4A:2-6.2 provides in pertinent part:
(a) If an employee resigns without complying with the required notice in N.J.A.C. 4A:2-6.1, he or she shall be held as having resigned not in good standing.
(b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be reasonably denied.
(c) An employee who has not returned to duty for five or more conseccutive business days following an approved leave of absence shall be considered to have abandoned his or her position.

[4]N.J.A.C. 4A:2-2.3(a)6 provides "[a]n employee may be subject to discipline for:... 6. Conduct unbecoming a public employee.

[5]N.J.A.C. 4A;2-2.3(a)2 provides "[a]n employee may be subject to discipline for: 2. Insubordination.

> order or termination subject to Mr. O'Brien's meeting certain conditions which I believe faily meet the concerns of the City regarding safety to its citizens and employees, and its obligation to reasonably try to accommodate Mr. O'Brien's handicap.

(def. ex. H at 2) LaCava also found that O'Brien's drug use "would most certainly cause injury to himself or to others." Id.

This order placed O'Brien on an involuntary leave of absence commencing April 20, 1995 for a period of not less than 60 days, during which time O'Brien was required to: (1) enter into an inpatient drug abuse program for at least 28 days; (2) upon completion of the inpatient program, enter into an outpatient therapy program for a minimum of 20 sessions; and (3) present himself for a fitness for duty examination. (def. ex. H)

Upon completion of outpatient therapy, O'Brien was to be reinstated as a firefighter conditioned on his remaining in an outpatient therapy program for 6 months following his return to work. O'Brien was also required to submit to drug tests for one year. (def. ex. H) LaCava's Opinion was made final by a Final Notice of Disciplinary Action ("FNDA") dated April 19, 1995. (def. ex. I) O'Brien appealed this decision to the New Jersey Department of Personnel ("DOP"). (def. ex. J)

On June 6, 1995, the Hackensack City Council agreed to pay medical costs of up to $7,000 for inpatient treatment for O'Brien not otherwise covered by medical insurance. (def. ex. K)

O'Brien found trouble again on June 1, 1995, when he was arrested for attempting to steal a spare tire in Englewood Cliffs. (def. ex. M) As a result, Hackensack filed a PNDA on June 20, 1995 charging O'Brien with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6). (def. ex. M) O'Brien was immediately suspended without pay. (def. ex. M) O'Brien initially pleaded guilty to the theft charge, but that plea was eventually vacated and the charges were dismissed. (Pl. Br. at 7)

Thereafter, on August 21, 1995, Hackensack issued a third PNDA charging O'Brien with failure to comply with the April 19, 1995 Order in violation of N.J.A.C. 4A:2-2.3. (def.

ex. N)

With the disciplinary charges still pending, O'Brien filed discrimination charges with the New Jersey Division on Civil Rights and the Equal Opportunity Employment Commission ("EEOC"), on September 8, 1995, alleging that Hackensack's actions violated the ADA. (def. ex O)

City Manager LaCava conducted hearings on September 5, and October 5, 1995, concerning the two pending PNDAs. (O'Brien dep. at 48) At these hearings, the parties agreed that O'Brien would plead guilty to the charge of conduct unbecoming a municipal employee; that O'Brien would withdraw his appeal of the April 1995 decision; that O'Biren would withdraw his complaint with DOP and the EEOC alleging discrimination under the ADa; that Hackensack would return O'Brien to his duties as a firefighter; that hackensack would not require O'Brien to reimburse unemployment benefits that he collected during his suspension; that O'Brien would continue his outpatient therapy for drugs and alcohol for six months following his return to work and provide proof of such attendance; and, that O'Brien wouldbe tested for alcohol or drug use. (Tr. of October 5, 1995 at 50-58) This agreement was finalized on october 13, 1995.

As a result, O'Brien was cleared for duty and assigned to First Platoon, beginning October 17, 1995. (def. ex. R)

O'Brien's problems were renewed on December 9, 1995, when he was arrested in Bergenfield and charged with possession of marijuana. (def. ex. W) As a result, Hackensack issued a PNDA on December 11, 1995, charging O'Brien with conduct unbecoming a public employee in violation of N.J.A.C. 4A;2-2.3(a)6; and insubordination in violation of N.J.A.C. 4A:2-2.3(a)2 for failure to comply with the terms of the earlier agreements. (def. ex. X) These charges resulted in O'Brien's suspension pending the disposition of the criminal complaint. (def. ex. X) Following, his release from custody, O'Brien voluntarily underwent a drug test, on December 11, 1995, which was administered by his personal physician Dr. Paul Diamond. This test indicated that O'Brien had no drugs or alcohol in his system. (O'Brien cert. at 30-31)

A trial was conducted in Bergenfield Municipal Court on June 25, 1996 and November 5, 1996 on the marijuana

possession charges. Trial testimony established that a Bergenfield Police Officer stopped O'Brien on December 9, 1995, for a motor vehicle code violation. (Tr. of July 25, 1996 at 5 to 16) The police officer determined that O'Brien's driver's license had been suspended and warrants for his arrest were outstanding; therefore, he placed O'Brien under arrest and transported him to the Bergenfield Police Station. The Police Officer searched O'Brien while he was in custody and found two foil packets containing a white substance in O'Brien's pants, as well as, a cigarette box containing two burnt marijuana cigarettes in his jacket. (Tr. of Nov. 5, 1996 at 18 to 19)

Near the conclusion of the case, O'Brien requested that the Court withhold its decision to allow him to enter a drug treatment program. O'Brien entered such a program, therefore, the Municipal Court granted O'Brien a conditional discharge on November 5, 1996.

LaCava conducted a hearing on the pending disciplinary charges on March 21, 1997. (def. ex. CC) In a written Opinion, dated May 14, 1997, LaCava found that O'Brien's termination effective December 12, 1995 was warranted based upon findings of conduct unbecoming a public employee and insubordination. In sum, LaCava concluded that O'Brien's employment should be terminated to ensure public safety and the safety of O'Brien's fellow firefighters. LaCava explained:

> A public employee serving as a firefighter is entrusted daily with the personal safety of the citizens he serves and his fellow firefighters. The past history of Firefighter O'Brien's disciplinary problems and drug abuse, while tragic, are undisputed. The City has met its legal responsibilities over this period of time, to proactively, and with the expenditure of significant public funds, assist Firefighter O'Brien on the path of rehabilitation. This has not been successful. The fact that sixty (60) days after returning to work (after a seven month period of suspension/leave of absence due to a drug abuse problem) Firefighter O'Brien is again found to be in possession of a controlled dangerous

> substance, speaks volumes on the seriousness of this situation.

(def. ex. CC) LaCava issued a Final Notice of disciplinary Action on May 15, 1997, terminating O'Brien's employment for the reasons set forth in his May 14, 1997 Opinion (def. ex. DD)

O'Brien filed an administrative Complaint with the EEOC on november 13, 1997, alleging that from September 8, 1995 to March 10, 1997, Hackensack had committed acts which violated O'Brien's rights under the ADA. (def. ex. EE) The EEOC issued a right to sue letter on September 28, 1998. (def. ex. FF)

O'Brien filed the instant Complaint pro se on December 21, 1998. Hackensack filed a motion to dismiss on May 13, 1999, which Judge lechner granted as unopposed on June 18, 1999. However, that dismissal was vacated by the United States Court of Appeals for the Third Circuit on July 10, 2000, because Counsel had filed an appearance on O'Brien's behalf on May 28, 2000 and the Appeals Court believed that Judge Lechner did not allow Counsel sufficient time to respond to the motion to dismiss. The Third Circuit explained that the Motion relied upon facts outside the pleadings and O'Brien was not given "a reasonable opportunity to rpesent all material made pertinent to such a motion by Rule 56." O'Brien v. Hackensack, No. 99-5604 (3d Cir. May 30, 2000) Slip Op. at 8-9. Thereafter, final pretrial statements were filed. The instant motions followed.

III. SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the moving party must establish "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The district court's task is to determine whether disputed issues of material fact exist, but the court cannot resolve factual disputes in a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

In determining whether a genuine issue of material fact

exists, the court must view the facts in the light most favorable to the non-moving party and extend all reasonable inferences to that party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Stephens v. kerrigan, 122 F.3d 171, 176-77 (3d Cir. 1997). The moving party always bears the intial burden of demonstrating the absence of a genuine issue of material fact, regardless of which party ultimately would have the burden of persuasion at trial. Celotex Corp. v. Catret, 477 U.S. 317, 323 (1986). Once the moving party has met its opening burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that genuine issues exist for trial. Id. at 324. Thus, the non-moving party may not rest upon the mere allegations or denials of its pleadings. Id. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

The Supreme Court has specifically recognized that:

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupportable claims or defenses, and [] that [the rule] should be interpreted in a way that allows it to accomplish this purpose.

Celotex, 477 U.S. at 323-24. Thus, "[W]hen the record is such that it would not support a rational finding that an essential element of the non-moving party's claim or defense exists, summary judgment must be entered for the moving party." Turner v. Schering-Plough Corp., 901 F.2d 335, 341 (3d Cir. 1990).

In employment discrimination claims, a defendant is entitled to summary judgment if it can demonstrate that the plaintiff can not carry the burden of proof at trial. Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989). This can be demonstrated in one of two ways. First a defendant may show that the plaintiff is unable to establish a prima facie case of discrimination. Id. at 707. Second, if the plaintiff has

successfully established a prima facie case of discrimination, the defendant is entitled to summary judgment if it can show that the plaintiff cannot produce sufficient evidence of pretext to rebut the defendant's asserted nondisriminatory reaons for the discharge. Id. at 707.

A plaintiff may defeat a motion for summary judgment (or judgment as a matter of law) by pointing "to some evidence, direct or circumstantial, from which a factfinder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating ot determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

IV. DISCUSSION[6]

A. ADA and the Rehabilitation Act

The ADA[7] prohibits employers from discriminating

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[6]Although the discussion in this Opinion focuses on O'Brien's claim under the ADA, it applies equally to his claim under the Rehabilitation Act. Donahue v. Consolidated Rail Corp., 224 F.3d 226, 229 n.2 (3d Cir. 2000). The Rehabilitation Act provides that "the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d).

[7]Title I of the ADA provides in pertinent part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2000). Title II of the ADA provides in pertinent part: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the servides, programs, or activities or a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2000).
The Rehabilitation Act provides in pertinent part:

against a qualified individual with a disability, because of that disability, "regarding job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Taylor v. Phoenixville School Dist., 184 F.3d 296, 305 (3d Cir. 1999) (quoting 42 U.S.C. § 12112(a)). Therefore, "an employer commits unlawful discrimination under the ADA if the employer does 'not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardhsip onthe oepration of the business of [the employer].'" Taylor, 184 F.3d at 311 (quoting 42 U.S.C. § 12112(b)(5)(A)).

The ADA defines a "qualified individual with a disability" as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id. (quoting 42 U.S.C. § 12111(8)). This means that plaintiff must possess all of the prerequisites for holding the position such as "possessing the appropriate educational background, employment experience, skills, licenses, etc." Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998) (citing 29 C.F.R. Pt. 1630, App. § 1630.2(m) at 351). A "disability" is defined by this statute as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual, " or "a record of such impairment," or "being regarded as having such an impairment." Id. at 306 (42 U.S.C. § 12102(2)).

The United States Court of Appeals for the Third Circuit has dictated that the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S.

> No otherwise qualified individual with a disability in the United States, ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

29 U.S.C. § 794(a) (2000)

792 (1973), is to be utilized in analyzing ADA claims. Shaner v. Synthes(USA), 204 F.3d 494, 501 (3d Cir. 2000) (citing walton v. Mental health Ass'n of Southeastern Pa., 168 F.3d 661, 667-68 (3d Cir. 1999)). The McDonnell Douglas framework consists of three stages. Id. First, the plaintiff must esablish a prima facie case of discrimination. McDonell Douglas, 411 U.S. at 802. Second, if the plaintiff satisfies this initial burden, the defendant must articulate a "legitimate, nondiscriminatory reason for the empoyee's rejection." Id. Third, if the defendant carries its burden, the plaintiff then receives the opportunity to offer prove that the defendant's proffered "legitimate nondiscriminatory" explanation was a pretext for discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). While the burden of production may shift, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff remains at all times with the plaintiff." Id.

An ADA plaintiff establishes a prima facie case of discrimination by demonstrating that: (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination. Gaul v. Lucent Technologies, Inc., 234 F.3d 576, 579 (3d Cir. 1998) (citing Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996)). "[T]he burden is on the employee to prove that he is 'an otherwise qualified' individual." Id. (citing Buckingham v. United States, 998 F.2d 735, 739-40 (9th Cir. 1993)).

In the instant case, O'Brien cannot establish a prima facie case of discrimination. First, O'Brien cannot establish that he was otherwise qualified for a position as a firefighter. Second, O'Brien cannot establish that he was terminated because of his disability. O'Brien's inability to establish either of these facts defeats his claim, therefore, summary judgment is appropriate.

i. Qualified individual with a disability

O'Brien asserts that despite his history of substance

abuse, he was "a qualified individual with a disability" for a position as a firefighter. (P. br. at 16) However, this assertion fails to take into account the facts which clearly indicate that O'Brien continue to use and possess illegal drugs until his final suspension from the fire department in December 1995.

O'Brien is correct in his assertion that the ADA specifically prohibits employers from discriminating against drug addicted employees who have sought rehabilitation and are no longer using drugs. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 980 n.2 (3d Cir. 1998) (citing 42 U.S.C. § 12114(b)). However, the plain language of the statute limits that protection to rehabilitated empoyees. Id. The ADA provides that a "qualified individual with a disability' does not include an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a).

The EEOC's Technical Assistance Manuel on the ADA interprets this section of the ADA, it provides:

> "Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem. It is not limited to the day of use, or recent weeks or days in terms of an employment action. It is determined on a case-by-case basis.

Salley, 160 F.3d at 980 n.2 (quoting Equal Employment Opportunity commission, Technical Assistance Manuel on the Employment Provisions (Title I) of the ADA § 8.3 (1992)). Similarly, "current drug use" has been defined by other district courts in this Circuit to include "illegal drug use that bears a temporal relationship to the employment action such that an employer may reasonably conclude at the time of the employment action that illegal drug use is an ongoing problem." Law v. Garden State Tanning, 159 F.Supp.2d 787, 793 (E.D. Pa. 2001) (citing Salley v. Circuit City Stores, Inc., No. 96-6368 (E.D. Pa. Oct. 29, 1997), aff'd on other grounds, 160 F.3d 977 (3d Cir. 1998)).

All of the facts submitted in this case lead to the sad clnclusion that O'Brien continued to use drugs and alcohol

throughout his tenure as a firefighter. This behavior occurred before, during and after his suspension from the department. The recuring nature of O'Brien's drug use is best illustrated in O'Brien's Deceember 9, 1995 arrest in Bergenfield where he was found to be in possession of cocaine and two partially burned marijuana cigarettes. Notwithstanding the results of the blood test taken by his private physician, indicating that he did not have drugs in his system, the fact remains that he was arrested with drugs in his possession, only sixty days after his reinstatement. This clearly illustrates O'Brien's continuing drug dependency.

O'Brien does not fit the definition of a "qualified individual with a disability." Therefore, he cannot establish a prima facie case of discrimination.

ii. Termination as a result of disability

Another element of a prima facie case of discrimination requires O'Brien to establish that he was terminated because of his drug use. However, this is simply not the case.

The Third Circuit has recognized a distinction between an adverse employment action due to "addiction-related misconduct" and an adverse employment action "due to the disability of an addiction." Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998). Generally speaking, an employer canot fire an employee because of the "disability of addiction" without running afoul of the ADA; however, it is legitimate for an employer to terminate an employee due to his or her "addiction-related misconduct." Id. Therefore, Courts have repeatedly recognized that "while the ADA 'protects an individual's status as an alcoholic, merely being an alcoholic does not insulate one from the consequences of one's actions.'" Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1182-83 (6th Cir. 1997) (citing Flynn v. Raytheon, 868 F.Supp. 383, 387 (D.Mass. 1994); Larson v. Koch Refining Co., 920 F.Supp. 1000, 1004 (D. Minn. 1996))

The ADA provides that an employer may hold an alcoholic or drug-dependent employee "to the same qualification standards for employment or job performance and behavior that such entity hold other employees, even if any

unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. § 12114(c). The ADA "operates to allow employers to respond to addiction-related misconduct in a way that they cannot respond to other disability related misconduct." Salley, 160 F.3d at 981. For example, an employer is not obligated to accommodate absenteeism attributable to alcoholism. Smith v. Davis, 248 F.3d 249, 251 (3d Cir. 2001). On the other hand, an employer's refusal to allow an employee to enter an alcohol treatment center without being terminated is a failure to provide a reasonable accommodation.

In this case, O'Brien was terminated for conduct unbecoming a public employee and insubordination. With regards to the charge of conduct unbecoming a public employee, Town Manager LaCava's Opinion specifically points to O'Brien's two arrests in 1995, i.e., the June 1, 1995 arrest in Englewood Cliffs for stealing a spare tire, and the December 9, 1995 arrest in Bergenfield for possession of a controlled dangerous substance. With regards to the insubordination charge, LaCava's opinion points to O'Brien's failure to enroll in an inpatient drug treatment program, in violation of the April 18, 1995 Opinion, that allowed him to return to work after his first suspension. O'Brien did not enroll in such a program despite the fact that Hackensack made funds available to O'Brien to pay for the treatment.

Hackensack did not terminate O'Brien because of his disability. In fact, throughout the course of O'Brien's employment with Hackensack, the city made a number of accommodations in an attempt to help him overcome his drug and alcohol dependency. In the end, O'Brien was terminated because his actions were found to be unbecoming a public employee and for failing to comply with the April Order that allowed him to return to work after his initial suspension. As a result, O'Brien cannot establish that he was terminated because of his disability. Therefore, he cannot establish a prima facie case of discrimination. Summary judgment is appropriate.

B. Privacy Act

O'Brien asserts a claim under the Privacy Act claiming

that Hackensack "compromise[d] [his] relationship with his labor union by unlawfully releasing confidential medical information to unauthorized personnel." (Compl.) However, O'Brien cannot possibly recover against Hackensack under this statute because it applies to actions by the federal government, not actions of state and local governments. 5 U.S.C. § 551: Ciccone v. Waterfront Commission of New York Harbor, 438 F.Supp. 55, 58 (S.D.N.Y. 1977). Since Hackensack is not an agency of the federal government, this claim cannot survive summary judgment.

V. CONCLUSION

For the reasons set forth above, this Court grants Hackensack's motion for summary judgment. An appropriate order is attched.

Date: May 6, 2002

s/ Joel A. Pisano
JOEL A. PISANO
U.S. District Judge

Orig: Clerk
cc: Magistrate Judge Arleo
All Parties
File

(2)

No. 03-906

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD O'BRIEN,

Petitioner,

vs.

CITY OF HACKENSACK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE CITY OF HACKENSACK IN OPPOSITION

RAYMOND R. WISS
Counsel of Record
THOMAS K. BOUREGY, JR.
WISS, COOKE & SANTOMAURO, P.C.
Three University Plaza
Suite 207
Hackensack, New Jersey 07601
(201) 488-1030
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

1. DISCLOSURE OF O'BRIEN'S DRUG AND ALCOHOL ADDICTION IN 1994-1995..... 1

2. O'BRIEN'S ARREST IN JUNE 1995 FOR THEFT..... 2

3. THE OCTOBER 1995 SETTLEMENT OF O'BRIEN'S ADA CLAIMS AND HIS REINSTATEMENT TO WORK..... 3

4. O'BRIEN'S ARREST IN DECEMBER 1995 FOR POSSESSION OF ILLEGAL DRUGS..... 4

SUMMARY OF THE ARGUMENT..... 8

REASONS FOR DENYING THE PETITION..... 9

I. NO BASIS EXISTS FOR THIS COURT TO ABANDON THE ANALYTICAL FRAMEWORK ESTABLISHED IN *McDONNELL DOUGLAS* AND ITS PROGENY..... 9

A. No Conflict Exists Among the Circuit Courts Regarding the Appropriateness of the *McDonnell Douglas* Analytical Framework..... 10

B. Abandonment of the *McDonnell Douglas* Framework Would Not Affect the Lower Courts' Dismissal of O'Brien's Complaint... 13

II. THE COURT SHOULD DENY CERTIORARI ON O'BRIEN'S DUE PROCESS CLAIMS..... 17

A. O'Brien Has Waived Any Affirmative Due Process Claim 17

TABLE OF CONTENTS – Continued

Page

B. Any Claim of Lack of Due Process is Without Merit 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986) 13

Bazemore v. Friday, 478 U.S. 385 (1986) 13

Dunaway v. International Brotherhood of Teamsters, 310 F.3d 758 (D.C. Cir. 2002) 13

Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3rd Cir. 1998) 15

Hernandez v. New York, 500 U.S. 352 (1991) 13

Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522 (11th Cir. 1997) 15, 16

In Matter of Cahill, 245 N.J. Super. 397, 585 A.2d 977 (App. Div. 1991) 23, 25, 26

Lawrence v. National Westminster Bank New Jersey, 98 F.3d 61 (3rd Cir. 1996) 24

Lindemann v. Mobil Oil, 141 F.3d 290 (7th Cir. 1998) 13

Matsushita Electric Indus. Co. Ltd. v. Epstein, 516 U.S. 365 (1996) 20

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

National Collegiate Athletic Association v. Smith, 525 U.S. 459 (1999) 20

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) 15

O'Brien v. Hackensack, 167 N.J. 89, 269 A.2d 1051 (2001) 20

TABLE OF AUTHORITIES – Continued

Page

O'Neil v. Ferguson Const. Co., 237 F.3d 1248 (10th Cir. 2001) 15

Raytheon Co. v. Hernandez, 540 U.S. ___ (2003) 11

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 9, 10

Register v. Lloyd McCorkle Training School, 92 N.J.A.R. 2d 697 (1992) 25, 26

Rizzo v. Children's World Learning Center, Inc., 84 F.3d 758 (5th Cir. 1996) 15, 16

Sabia v. Elizabeth, 132 N.J. Super. 6, 331 A.2d 620 (App. Div. 1975) 26

Salley v. Circuit City, Inc., 160 F.3d 977 (3rd Cir. 1998) 7

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 11, 12

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 16

Troutman v. East Jersey State Prison, 93 N.J.A.R. 2d 710 (CVS, 1993) 26

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 8, 12

United States v. Alvarez-Sanchez, 511 U.S. 358 (1994) 19

United States v. Williams, 504 U.S. 36 (1992) 19

Wells v. Colorado Dept. of Transp., 325 F.3d 1205 (10th Cir. 2003) 11, 12

Wixson v. Dowagiae Nursing Home, 87 F.3d 164 (6th Cir. 1994) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. §§551-552 7

29 U.S.C. §§796, *et seq.* 7

42 U.S.C. §§12101, *et seq.* 3

42 U.S.C. §12114(a) 7

N.J.S.A. 2C:36A-1 5

N.J.S.A. 10:5-1, *et seq.* 24

ADMINISTRATIVE REGULATIONS

N.J.A.C. 4A:2-2.3(a)6 ..... 7, 14

N.J.A.C. 4A:2.5 22

N.J.A.C. 4A:2-2.5(a)(1) 22, 23

N.J.A.C. 4A:2-2.6 21

N.J.A.C. 4A:2-2.7 22

RULES

Supreme Court Rule 10 10

New Jersey Rule of Evidence 803(b)(1) 21

STATEMENT OF THE CASE

1. DISCLOSURE OF O'BRIEN'S DRUG AND ALCOHOL ADDICTION IN 1994-1995

Petitioner Richard O'Brien ("O'Brien") was hired as a firefighter by Respondent City of Hackensack ("Hackensack") in 1990. In June 1994, O'Brien disclosed to Hackensack that he was experiencing problems related to excessive alcohol consumption (Pet. App. C, p. 15). In January 1995, O'Brien disclosed to Hackensack that he was experiencing problems due to substance abuse (*Id.*) At this time, Hackensack was also advised that O'Brien had appeared at the fire stations apparently under the influence of drugs and alcohol (Pet. App. A, p. 5).

After this disclosure, O'Brien submitted to a medical screening, the results of which were positive for both cocaine and marijuana (Pet. App. C, p. 15). O'Brien was then advised to provide a letter from his physician confirming his ability to return to work. After failing to provide such medical certification from his physician, O'Brien was advised he would be terminated if no such certification was received. (*Id.*)

On February 26, 1995, having received no such certification, a disciplinary action was filed by Hackensack against O'Brien charging him with four violations: (1) chronic absenteeism; (2) abandoning of his position; (3) conduct unbecoming a public employee; and (4) insubordination (*Id.*, pp. 15-16). On March 29, 1995, a hearing on these charges was held before City Manager James S. Lacava ("Lacava") (*Id.*, p. 16). By order dated April 19, 1995, Lacava determined that O'Brien was guilty of all four charges. While Lacava determined that O'Brien's substance-abuse problems warranted his termination, he

further determined that O'Brien was a handicapped person whose condition fell within the protection of the New Jersey Law Against Discrimination. (*Id.*)

Accordingly, Lacava placed O'Brien on an involuntary leave of absence for sixty (60) days, on the condition that O'Brien participate in a drug treatment program and submit to periodic drug testing upon his return to work (*Id.*, pp. 16-17).

2. O'BRIEN'S ARREST IN JUNE 1995 FOR THEFT

On June 1, 1995, plaintiff was arrested in Englewood, New Jersey and pled guilty to a charge of attempted theft. On June 20, 1995, Hackensack filed disciplinary charges against O'Brien for conduct unbecoming a public employee based on the charge of attempted theft (Pet. App. A, p. 6). O'Brien was suspended immediately without pay (Pet. App. C, p. 17). However, in mid-July 1995, Hackensack learned that O'Brien's guilty plea had been "vacated" and the July, 1995 disciplinary hearing relating to this charge of attempted theft was adjourned until Hackensack could get further details on the status of the theft charge which, despite the guilty plea being "vacated", was still pending (Pet. App. A, p. 6).

In August 1995, additional disciplinary charges were filed by Hackensack against O'Brien charging him with failing to attend the rehabilitative program required under Lacava's April 1995 ruling (Pet. App. C, p. 17).

3. THE OCTOBER 1995 SETTLEMENT OF O'BRIEN'S ADA CLAIMS AND HIS REINSTATEMENT TO WORK

On September 5, 1995, a hearing commenced concerning the June and August 1995 charges. (*Id.*, p. 18). However, prior to completion of said hearing, the parties commenced settlement discussions to resolve all charges.

Following the September 5, 1995 hearing and prior to any settlement, O'Brien filed a claim with the EEOC alleging that Hackensack had, in violation of the Americans With Disabilities Act of 1990, 42 U.S.C. §§12101, *et seq.* ("the ADA") discriminated against him because of his disability, *i.e.* his substance abuse (*Id.*)

Ultimately, a settlement agreement was reached resolving all issues between the parties (Pet. App. A, p. 6), whereby Hackensack agreed to withdraw the charges arising from his failure to attend a rehabilitative program and also agreed to return O'Brien to work. In turn, O'Brien pled guilty to the charge of conduct unbecoming a public employee arising from his theft charges in June, 1995. O'Brien further agreed to dismiss both his appeal of the April 19, 1995 Order and his ADA claims. (*Id.*)

O'Brien further agreed that he would continue with his out-patient therapy for a period of six (6) months from his return to work in October, 1995 and that should he violate any drug or alcohol aspect of the agreement, immediate charges would be filed seeking to terminate him. In accordance with the settlement agreement, O'Brien was reinstated to duty as of October 17, 1995 (Pet. App. A., p. 6).

4. O'BRIEN'S ARREST IN DECEMBER 1995 FOR POSSESSION OF ILLEGAL DRUGS

On December 9, 1995, less than two months after returning to work, O'Brien was arrested by the Bergenfield, New Jersey police and charged with possession of marijuana (Pet. App. C, p. 18). As a result of such arrest and criminal charge, Hackensack filed disciplinary charges against O'Brien for conduct unbecoming a public employee and for insubordination for failure to abide by his earlier agreements. Hackensack suspended O'Brien without pay effective December 12, 1995, pending disposition of his criminal charges. (*Id.*) The hearing on these disciplinary charges was adjourned at O'Brien's request until the disposition of the drug charges in the Bergenfield Municipal Court.

The trial of the drug charges against O'Brien in Bergenfield Municipal Court commenced on July 25, 1996 and continued thereafter on November 5, 1996. (*Id.*) At the trial, it was stipulated that O'Brien, while operating a motor vehicle, was stopped by Bergenfield Police Officer John Casper ("Casper") on December 9, 1995 (*Id.*, p. 19).

O'Brien was placed under arrest for outstanding arrest warrants and a custodial search of O'Brien was conducted by Officer Casper. Inside O'Brien's pants, two foil packets containing a trace of a white substance were found. In O'Brien's inside jacket pocket a cigarette box was found containing two burnt marijuana cigarettes. (*Id.*) At the time the foil packets with the white powdery substance were found, O'Brien began to struggle with Casper and, with the help of a second police officer, O'Brien was subdued. It was at this point that the marijuana was discovered. O'Brien's fiancée, who was a passenger in the car at the

time of the arrest, testified that prior to the arrest (1) she was not aware of the cigarette box or the marijuana being in the jacket and (2) that the jacket in which the drugs were found by the police belonged to O'Brien (Ja 225).

After O'Brien was subdued and the above items recovered, O'Brien accused Officer Casper of planting the drugs on him and alleged that he did not know where the drugs came from (Ja 216). The seized items were then packaged and labeled for identification. The laboratory test conducted on the seized items were positive for both marijuana and cocaine [1] (Ja 222).

At the continuation of the trial on November 5, 1996, the Municipal Court denied O'Brien's motion to suppress the laboratory test results of the seized items (Ja 219-221). No appeal was taken from the denial of said motion to suppress and O'Brien has never contested the results of these laboratory tests.

At the conclusion of O'Brien's defense in the Bergenfield Municipal Court, O'Brien requested that the Court withhold its decision and allow him time to decide whether he wished to apply for a conditional discharge under a New Jersey law which would, after agreement by O'Brien to supervised treatment, result in the dismissal of the charges. *See N.J.S.A.* 2C:36A-1. O'Brien did apply for such program and in early December 1996, the drug charges against O'Brien were conditionally dismissed, *without an adjudication of his guilt or innocence* (Pet. App. C, p. 19).

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[1] While the laboratory results were positive for cocaine, O'Brien was only charged with possession of marijuana.

The criminal action having been completed, Hackensack scheduled a hearing on the December 1995 disciplinary charges. At the hearing, at which O'Brien was represented by counsel, the above facts were presented in the form of testimonial and documentary evidence. Thereafter, by written opinion dated May 14, 1997, Lacava rejected O'Brien's contention that he was not afforded a timely hearing and denied O'Brien's application to dismiss the disciplinary charges arising from his drug possession. (*Id.*)

Regarding the charges of conduct unbecoming a public employee, Lacava noted that "the proof of O'Brien's guilt is overwhelming." (Ja 234). Lacava further found that O'Brien had failed to complete his out patient therapy as required (Pet. App. A, p. 7).

Based on the above, Lacava terminated O'Brien's employment. In ruling that the circumstances in this case made termination both necessary and appropriate, Lacava stated:

> A public employee serving as a firefighter is entrusted daily with the personal safety of the citizens he serves and his fellow firefighters. The past history of Firefighter O'Brien's disciplinary problems and drug abuse, while tragic, are undisputed. The City has met its legal responsibilities over this period of time, to proactively, and with the expenditure of significant public funds, assist Firefighter O'Brien on the path of rehabilitation. This has not been successful. The fact that sixty (60) days after returning to work (after a seven month period of suspension/leave of absence due to a drug abuse problem), Firefighter O'Brien is again found to be in possession of a

> controlled dangerous substance, speaks volumes on the seriousness of this situation.

(Pet. App. C., pp. 19-20).

After his termination, O'Brien filed an administrative complaint with the EEOC. Thereafter, O'Brien filed the complaint in this matter alleging claims only under the ADA, the Rehabilitation Act, 29 U.S.C. §§796 *et seq.* and the Privacy Act, 5 U.S.C. §§551-552. O'Brien appeals to this Court only from the dismissal of the dismissal of the ADA claims.

Hackensack filed for summary judgment seeking dismissal of all of O'Brien's claims. In granting said motion, the District Court held that, under the *McDonnell Douglas* analysis, O'Brien was unable to establish a prima facie case of discrimination under the ADA (Pet. App. C, p. 24). In particular, the District Court found that (1) by virtue of his continuing use of drugs and pursuant to 42 U.S.C. §12114(a), O'Brien was not "a qualified individual with a disability," and (2) O'Brien was not terminated because of his disability but rather because of (i) his conduct (drug possession) unbecoming a public employee and (ii) his insubordination (Pet. App. C, pp. 26-27).

On appeal from the judgment of the District Court, the Third Circuit Court of Appeals, citing to *Salley v. Circuit City, Inc.*, 160 F.3d 977 (3rd Cir. 1998), affirmed the dismissal of O'Brien's complaint in its entirety, holding that (1) O'Brien was properly terminated under *N.J.A.C.* 4A:2-2.3(a)(6), which permits public employees to be disciplined for conduct unbecoming a public employee and (2) drug possession was plainly "unbecoming conduct" (Pet. App. A, p. 8).

SUMMARY OF THE ARGUMENT

1. The first question presented in the Petition should be denied, first, because no basis exists to overturn the analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny for deciding claims under the ADA. No Court of Appeals has adopted such a position and no division among them exists on this point. The *McDonnell Douglas* framework was not replaced or overturned by this Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), nor has any Court of Appeals so held.

Second, even if O'Brien's ADA claim was analyzed under the (different) standard he alleges was established in *Aikens*, summary judgment dismissing his claims would still be appropriate because no evidence of discrimination by Hackensack exists. Therefore, this Court's granting of the Petition and adoption of O'Brien's alternate analytical standard would not serve as a basis to reverse or vacate the summary judgment entered below.

2. The second question presented by the Petition should be denied first, because O'Brien never affirmatively asserted any due process claim below and no such claim was ever considered or decided by either the District Court or the Court of Appeals. Said claim is therefore waived. Second, such due process claim, even if asserted as alleged evidence of discriminatory intent, fails on its merits because O'Brien was afforded a timely hearing at which he was given a full and fair opportunity to contest the charges against him.

Finally, the penalty of termination of O'Brien's employment was appropriate under New Jersey state law for his possession of drugs.

REASONS FOR DENYING THE PETITION

I.

NO BASIS EXISTS FOR THIS COURT TO ABANDON THE ANALYTICAL FRAMEWORK ESTABLISHED IN *McDONNELL DOUGLAS* AND ITS PROGENY

From a reading of the first part of Question 1, it is difficult to understand exactly what issue O'Brien is requesting this Court to decide. This question appears to request that the Court decide, in light of its decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), what evidence, if any, must be proffered by an employee to establish liability under the ADA if the reasons asserted by the employer are false and pretextual?

It is doubtful whether this is, in fact, the issue O'Brien is asking this Court to decide. Such doubt is based on (1) Hackensack's belief that the issue decided in *Reeves* does not directly address this well-settled standard and (2) the fact that the body of O'Brien's Petition reflects a different, but more well-defined question. More particularly, O'Brien argues at pp. 8-12 of his Petition that the framework set forth in *McDonnell Douglas* and its progeny to address discriminatory treatment claims under the ADA should be rejected in place of a single question as to whether the employer's reason for an employee's termination was discriminatory.

This Court should not grant certification as to this issue because (1) no conflict exists among the Circuit Courts on this issue nor is there any basis under Supreme Court Rule 10, or otherwise, to grant certification; and (2) the position advocated by O'Brien on this issue would not affect the ruling in this case below by the Third Circuit.

A. No Conflict Exists Among the Circuit Courts Regarding the Appropriateness of the *McDonnell Douglas* Analytical Framework

While O'Brien urges the Court to "revisit" *Reeves* for the purpose of rejecting the *McDonnell Douglas* analytical framework, such revisiting is inappropriate insofar as the issue before the *Reeves* Court did not address such question. Rather, *Reeves* simply resolved a conflict among the Courts of Appeals in deciding that

> a Plaintiff's *prima facie* case of discrimination, combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

Reeves, 530 U.S. at 140. Therefore, a revisiting of the issue addressed by *Reeves* will not further O'Brien's request that this Court abandon the *McDonnell Douglas* framework.

Hackensack believes that the clearest expression of the question O'Brien desires this Court to decide is found at pp. 8 and 9 of the Petition where this Court is urged to abandon the *McDonnell Douglas* framework and adopt the

reasoning of discrimination cases which, according to O'Brien:

> ultimately focus on whether the employer's reason for termination was discriminatory . . . without going through the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and instead focus on the ultimate question of discrimination *vel non*, as pointed out by this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983).

In support of this position, O'Brien cites to the concurring opinion in *Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205 (10th Cir. 2003) (Pet. p. 8), which argues that the *McDonnell Douglas* framework creates more problems than it resolves, and suggests that this Court's decision in *Aikens* "constitutes a de facto overruling of the *McDonnell Douglas* framework." *Wells*, 325 F. 3d at 1226.

The foregoing position advocated by O'Brien is not supported by this Court's decisions in the 30 years since *McDonnell Douglas* was decided or in the 20 years since *Aikens* was decided. With respect to the continued vibrancy and usefulness of the *McDonnell Douglas* framework, this Court most recently, in *Raytheon Co. v. Hernandez*, 540 U.S. ___ (2003) (slip opinion at p. 5) in analyzing an ADA claim, recognized with approval the use of the "familiar burden-shifting approach first adopted by this Court" in *McDonnell Douglas*.

In an earlier decision, the procedural framework of *McDonnell Douglas* was acknowledged by Justice Scalia and Justice Souter in their respective majority and dissenting opinions as "a framework carefully crafted in precedents as old as 20 years." *St. Mary's Honor Center v.*

Hicks, 509 U.S. 502, 512 (1993). Justice Scalia's majority opinion in *St. Mary's*, responding to the concerns of the dissenting justices to the perceived undermining of such framework, is vigorous in its defense of the *McDonnell Douglas* framework. Therefore, contrary to O'Brien's view of the viability of *McDonnell Douglas*, this Court has consistently, without exception, upheld the utility and employment of such analytical framework.

O'Brien, however, argues that the *McDonnell Douglas* framework should be discarded in place of what he believes to be an alternative mechanism established in *Aikens* (Pet. 8). In so arguing, O'Brien again refers to the concurring opinion in *Wells*, *supra*, 325 F.3d at 1226.

Hackensack contends that any such reading of *Aikens* is erroneous. First, nothing in the opinion of *Aikens* itself supports such a position. In *Aikens,* this Court held simply that

> where the Defendant has done everything that would be required of him if the Plaintiff had properly made out a *prima facie* case, whether the Plaintiff really did so is no longer relevant.

Id. at 715. Justice Blackman, in his concurring opinion in *Aikens*, in which Justice Brennan joined, stressed the fact that the majority's opinion reaffirmed the *McDonnell Douglas* framework. *Id.* at 1483.

Subsequent to *Aikens*, the Courts of Appeal have cited to *Aikens* simply for the proposition that on review, the appellate courts need not determine whether the Plaintiff at the trial level made out a *prima facie* case if otherwise the Defendant below had done what was required of him if such *prima facie* case, in fact, had been made. *See*, *e.g.*, *Wixson v. Dowagiae Nursing Home*, 87 F.3d 164, 170 (6th

Cir. 1994); *Lindemann v. Mobil Oil*, 141 F.3d 290, 296 (7th Cir. 1998) and *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758, 762 (D.C. Cir. 2002).

Second, in the cases decided by this Court subsequent to *Aikens* in which *Aikens* is cited, no language can be found that is supportive of O'Brien's position. *See e.g. Bazemore v. Friday*, 478 U.S. 385, 398 (1986); *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986) and *Hernandez v. New York*, 500 U.S. 352, 359 (1991).

B. Abandonment of the *McDonnell Douglas* Framework Would Not Affect the Lower Courts' Dismissal of O'Brien's Complaint

Even if this Court were to agree to O'Brien's request to abandon the *McDonnell Douglas* framework and proceed to the question of whether Hackensack improperly discriminated against him, such analysis would still result in the dismissal of O'Brien's ADA claims. The courts below both held that no facts existed to support O'Brien's allegation that he was terminated because of any disability. Specifically, the District Court found:

> In this case, O'Brien was terminated for conduct unbecoming a public employee and insubordination . . .
>
> Hackensack did not terminate O'Brien because of his disability. In fact, throughout the course of O'Brien's employment with Hackensack, the city made a number of accommodations, in an attempt to help him overcome his drug and alcohol dependency. In the end, O'Brien was terminated because his actions were found to be unbecoming a public employee . . . As a result, O'Brien cannot

establish that he was terminated because of his disability.

(Pet. App. C, p. 27)

Similarly, the Court of Appeals concluded:

> No one would reasonably conclude, on this record, that O'Brien was terminated for his addiction rather than for the misconduct of drug use and possession. The record reveals that the City clearly terminated O'Brien in response to his arrest for possession of drugs, which is a permissible reason under the ADA . . .
>
> [T]ermination based on drug possession and failure to accommodate drug related misconduct are not violations of the ADA. Absent evidence that the employer was motivated by the employee's status, as opposed to mere drug use or possession, there can be no ADA discrimination claim. O'Brien has not demonstrated that the actions of the City were motivated by his status, rather than by his drug possession. Only when he was arrested for his drug possession was he terminated. After showing some tolerance for O'Brien's addiction in the past, the City promptly terminated him after the arrest. It acted in accordance with *N.J.A.C.* 4A:2-2.3(a)6, which permits the discipline of public employees for "[c]onduct unbecoming a public employee." Arrest on drug possession is plainly unbecoming conduct . . .
>
> The City was not motivated by O'Brien's actual use of drugs at the time of the discharge, but by his possession of drugs and his arrest on a drug-related charge.

(Pet. App. A, pp. 8-9).

The foregoing opinions clearly demonstrate that the factual record in this case is devoid of any evidence that Hackensack terminated O'Brien based on his disability status, as opposed to his drug possession. Evidence of such causal connection is required to state a prima facie case. *See Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 (11th Cir. 1997); *Rizzo v. Children's World Learning Center, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999); *Gaul v. Lucent Technologies, Inc.* 134 F.3d 576, 580 (3rd Cir. 1998) and *O'Neil v. Ferguson Const. Co.*, 237 F.3d 1248, 1252 (10th Cir. 2001).

Because there is no evidence of any causal connection between O'Brien's disability (as opposed to his act of drug possession) and the termination of his employment, the District Court and Court of Appeals held no prima facie could be proven.

O'Brien attempted below to create disputed material facts regarding his attendance at drug treatment programs, Hackensack's payment for rehabilitative treatment and his actual use of the drugs at the time he was found to be in possession in December 1995 (Pet., pp. 12-14). However, while Hackensack disputes such "facts", these issues are not relevant to the critical, undisputed fact that his termination was based only on his undisputed drug possession in December 1995.

The foregoing record reflects that regardless of whether the *McDonnell Douglas* framework, or the alternative framework advocated by O'Brien, is utilized, there are no facts upon which a reasonable person could conclude that O'Brien was terminated as a result of his disability status rather than his drug possession. Therefore, even if

this Court were to abandon the 30 years of precedent following *McDonnell Douglas*, such abandonment would not change the conclusion that no violation of the ADA occurred. Accordingly, the Petition should be denied.

O'Brien also asks this Court to decide as part of his first question presented, "should the employer have to prove the specific reasons relied upon as the basis for termination?" (Pet., p. i). Such question is not relevant to the disposition of this case as presented to this Court. The Courts below concluded that the record showed no evidence of discriminatory intent by Hackensack. Under either the *McDonnell Douglas* analysis or the analysis advocated by O'Brien the burden of proving discriminatory intent always remains with the plaintiff. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under *McDonnell Douglas*, plaintiff bears the burden of showing discriminatory intent as part of his prima facie case. *See Holbrook* and *Rizzo*, *supra*. If he fails to do so, the employer is not required to prove the non-discriminatory reasons for the termination. Even under the alternate framework suggested by O'Brien, the employee still has the burden of proving discriminatory intent; the employer's stated reasons for such termination are simply considered by the factfinder in determining whether the employee has met such burden. *See Burdine*, *supra*.

Therefore, the question of what the employer must prove under the ADA is not germane to the disposition of this case as postured, nor is there any other reason for the Court to grant certiorari on this question.

II.

THE COURT SHOULD DENY CERTIORARI ON O'BRIEN'S DUE PROCESS CLAIMS

A. O'Brien Has Waived Any Affirmative Due Process Claim

The second question presented by O'Brien concerns his allegation that he was, without due process, deprived of his constitutionally protected property interest in his tenure as a firefighter because (1) he was not given a timely hearing before being terminated in 1997; (2) he was not given a fitness for duty hearing before being suspended without pay in 1995 following his drug arrest; and (3) the criminal trial transcript was used at his disciplinary hearing in 1997.

It is unclear if O'Brien by such question seeks to assert an affirmative due process claim as a cause of action, or whether he argues that the alleged violation of his due process rights was evidence of Hackensack's alleged discrimination which should have served to defeat Hackensack's summary judgment motion. If O'Brien is requesting this Court to grant his Petition on the basis that the Court of Appeals erred in not ordering affirmative relief under a due process claim, such request must be denied because O'Brien has waived his right to assert same.

O'Brien's complaint in this matter asserted no due process claim (Ja 33). Before the District Court, O'Brien's Final Pretrial Statement (Ja 279-282) acknowledged that he understood "that he is precluded from offering at trial any claims . . . which have not been disclosed in this submission" (Ja 279). Despite such acknowledgment, no

due process claim was in any way referenced in his Final Pretrial Statement.

In his response to Hackensack's summary judgment motion, O'Brien filed a cross motion for partial summary judgment solely for a declaration that he was a "qualified individual under the ADA." In his brief in opposition to Hackensack's summary judgment motion and in support of such cross motion, passing reference is made to O'Brien's due process rights *not in support of any affirmative claim for damages or relief* but solely as alleged evidence of Hackensack's discriminatory intent. For this reason, Hackensack had no reason to, and did not, engage in any discussion of such affirmative due process claim in its reply papers to the District Court.

More importantly, the District Court's opinion (Pet. App. C, pp. 13-28) makes no reference to and makes no ruling on any such claim by O'Brien. The only logical reason for this is simply that the District Court did not, and had no reason to, recognize such an affirmative claim being made. Accordingly, any affirmative due process claim which O'Brien now requests this Court to adjudicate was never presented to or decided by the District Court.

Similarly, no reference was made to any due process claim in O'Brien's Notice of Appeal to the Court of Appeals (Ja 24-26). While the Notice of Appeal specifically delineated five bases for his appeal from the District Court judgment, no reference to an appeal from any due process claim is mentioned. Further, in O'Brien's forty-one page moving brief filed with the Court of Appeals, not one reference to any due process claim was made. In light of such fact, and absent any such claims before the District

Court, Hackensack did not address any such claim in its opposition brief filed with the Court of Appeals.

It was only in his reply brief to the Court of Appeals that O'Brien, for the first time before that Court, alleged he was not afforded due process by Hackensack. Because such issue was only first raised in O'Brien's reply brief, and because there was no oral argument before the Third Circuit, Hackensack had no opportunity to address same. However, again, O'Brien raised such issue in support of his contention that disputed facts existed regarding Hackensack's intent. The relief sought by O'Brien in his appeal to the Court of Appeals makes no reference whatsoever to any affirmative claim for relief based on denial of due process. Given the foregoing history, it is not surprising that the opinion of the Court of Appeals makes no reference to any affirmative due process claim.

Finally, at no time below did O'Brien ever state that a due process claim under the United States Constitution was a basis for the federal courts' subject matter jurisdiction in this matter, and O'Brien's Petition makes no such reference in the "Constitutional and Statutory Provision Involved" in this case (Pet., p. 1).

It is well-settled that, absent exceptional circumstances, this Court does not address claims that were neither "pressed nor passed upon below." *See United States v. Williams*, 504 U.S. 36, 40 (1992) and *United States v. Alvarez-Sanchez*, 511 U.S. 358, 360 (1994). O'Brien has articulated no such exceptional circumstances and none exist.

In his Petition, O'Brien argues for the first time an affirmative due process claim which was never the subject of legal argument or consideration by the District Court or

the Court of Appeals.[2] Having so waived such claims, it is patently unfair to now ask Hackensack to respond to such claims.[3]

This Court has also held that it will not decide an issue upon which the lower courts did not pass, *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 470 (1999), nor "address arguments that were not the basis for the decision below." *Matsushita Electric Indus. Co. Ltd. v. Epstein*, 516 U.S. 365, 379, fn.5 (1996). Because the lower courts in this case neither considered nor decided any affirmative due process claim, the Court should not grant O'Brien's Petition on this question.

B. Any Claim of Lack of Due Process is Without Merit

Whether viewed as an affirmative claim for relief or as alleged evidence of discriminatory intent by Hackensack, O'Brien's allegation of lack of due process is without merit.

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[2] O'Brien did pursue an appeal from his termination both administratively and before the state court of New Jersey, alleging, *inter alia*, a violation of his right to a timely hearing. However, New Jersey's Merit System Board and the Appellate Division of the Superior Court of New Jersey both denied such appeal as untimely. Thereafter, O'Brien's Petition for Certification to the New Jersey Supreme Court from the Appellate Division's dismissal of his claim was denied. *O'Brien v. Hackensack*, 167 N.J. 89, 269 A.2d 1051 (2001). No appeal to the federal courts was taken from decision of the New Jersey courts. Having pursued such claims in the state court, O'Brien is precluded from doing so at this time.

[3] Reflective of such unfairness is O'Brien's reference to the transcript of the March 27, 1997 hearing. Said transcript was never introduced in any manner below and has never been part of the record in this case. Hackensack objects to its use at this time.

O'Brien was terminated only after a hearing was conducted as required by *N.J.A.C.* 4A:2-2.6.[4] O'Brien was given notice of the hearing and personally attended same. Further, O'Brien was represented by independent counsel of his own choice at the hearing and was afforded the opportunity to present any witness to testify on his behalf.

O'Brien argues he was not afforded due process because (1) the transcript from the criminal trial was introduced at the March 27, 1997 disciplinary hearing (Pet., pp. 17-19); (2) he was not given a timely hearing and (3) he was improperly suspended pending disposition of the criminal charges. As to the first point, it is entirely appropriate under New Jersey State law to introduce at the disciplinary hearing the prior testimony of O'Brien given at the criminal hearing.[5] Further, the transcript of Officer Casper's testimony at the criminal hearing was properly introduced at the March 27, 1996 disciplinary hearing. O'Brien and his attorney were present at the criminal hearing and were afforded every opportunity to cross-examine Officer Casper on the very issue of drug possession at issue in the disciplinary charges. The record is clear that the disciplinary hearing officer reviewed the entire transcript, including all questions posed to Casper on cross-examination by O'Brien's counsel (Pet., p. 17).

---

[4] The provisions of *N.J.A.C.* 4A:2-2.6 are set forth at page 17 of the Petition.

[5] New Jersey Rule of Evidence 803(b)(1) provides in relevant part that: "The following statements are not excluded by the hearsay rule: . . . (b) A statement offered against a party which is (1) the party's own statement . . ."

O'Brien's claim that he was not given a timely hearing under *N.J.A.C.* 4A:2-2.7 and *N.J.A.C.* 4A:2-2.5 is also without merit. *N.J.A.C.* 4A:2-2.7 entitled O'Brien to an immediate hearing "limited to the issue of whether the public interest would best be served by suspending the employee until the disposition of the" drug charges. However, following his arrest for drugs in December 1995, Hackensack agreed to *O'Brien's request* that the January 3, 1996 hearing be adjourned until disposition of the criminal charges (Pet., p. 20). Almost one year later, in late November 1996, Hackensack was advised by O'Brien's union representatives that the criminal proceedings had concluded. However, no details regarding the disposition of said charges were provided. Hackensack therefore ordered the trial transcript, and as soon as it was received, Hackensack immediately set a hearing for March 1997. Accordingly, following O'Brien's request to delay the hearing for almost one year, Hackensack then afforded O'Brien a timely hearing.

O'Brien argues that he was improperly suspended pending the disciplinary hearing on his termination. Such claim is unfounded. *N.J.A.C.* 4A:2-2.5(a)(1) provides that:

> 1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

In light of O'Brien's admitted substance abuse in early 1995, Hackensack's only responsible course of action was to suspend O'Brien when it learned of his arrest for drug possession in December 1995. As a firefighter, O'Brien was

entrusted with health and safety of Hackensack's citizens, and his fellow firefighters. This trust and duty could not be compromised by O'Brien's drug dependency. Against the backdrop of O'Brien's admitted drug use/dependency and his subsequent possession of drugs following rehabilitative efforts, the danger to Hackensack's citizens and firefighters clearly warranted O'Brien's immediate suspension under *N.J.A.C.* 2A:2-2.5(a)(1). Contrary to O'Brien's argument (Pet., p. 20) no "fitness for duty exam" was required. The three grounds for immediate suspension under *N.J.A.C.* 4A:2-2.5(a)(1) are set forth in the disjunctive. Hackensack's determination that O'Brien's immediate suspension was necessary for "the safety, health, order or effective direction of public services", was by itself a sufficient basis for its action.

O'Brien also argues (Pet., pp. 15-17) that under New Jersey law his termination was an inappropriate penalty for his drug possession and that somehow such termination is therefore a disputed fact which should have precluded summary judgment. However, whether or not such termination was an appropriate penalty is not an issue properly before this Court. As noted herein below at footnote 2, such argument was unsuccessfully pursued by O'Brien through New Jersey's state courts.

Further, O'Brien's legal argument in this respect is erroneous. Under the facts of this case, New Jersey law holds that termination of public employment for drug use/possession is entirely appropriate – particularly when concerning employees directly entrusted with the safety and welfare of the public. In *Matter of Cahill*, 245 N.J. Super. 397, 400-401, 585 A.2d 977 (App. Div. 1991) the Court was presented with facts on point with the present case. In *Cahill*, the plaintiff/firefighter was found to be an

alcoholic and drug dependent. Following this initial revelation to his employer, Cahill was suspended for six months and given the opportunity to rehabilitate himself. Approximately 18 months after being reinstated, Cahill was found to be using drugs again. The Appellate Division agreed with the Merit Board that Cahill was a handicapped person within the meaning of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* – a law analogous to and interpreted the same as the ADA. *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61 (3rd Cir. 1996). The Appellate Division, however, found that Cahill was nevertheless properly terminated after having been given one opportunity to rehabilitate himself:

> Cahill is a firefighter. The Merit System Board found that "the negligent or improper performance of that function can result in serious harm to persons and property." We see no reason to challenge that conclusion, obvious to anyone even superficially familiar with the perils inherent in the performance of a firefighter's duties . . . .
>
> Cahill emphasizes that his on-duty performance was exemplary during his fourteen years of employment with the city. The employer is not required to assume-or hope-that the employee will limit alcohol and other drug consumption to off duty hours, or that the effect of drugs will be dissipated by the time the workday begins. Moreover, a firefighter is subject to being called to duty when needed, anytime of the day or night . . . . A firefighter under the influence of drugs cannot do the job . . . .
>
> There is merit to his position that where feasible an employer should afford an opportunity for

> rehabilitation to an employee handicapped by substance abuse [cites omitted]. But Cahill had his chance at rehabilitation . . . Refusal to continue employment of a handicapped person is lawful where employment in a particular position would be hazardous to that individual or to others.

Cahill, supra, 245 N.J. Super. at 400-401.

Under *Cahill*, once a firefighter is given a chance to rehabilitate himself and thereafter continues his involvement with drugs, termination is entirely appropriate. Likewise, under any reasonable standard of due regard for public safety, Hackensack, having already accommodated O'Brien, in April 1995 and again in October 1995, was not required to hope or assume that O'Brien was not using drugs *despite his undisputed possession of same in December 1995* while supposedly continuing his rehabilitation.

In support of his position, O'Brien cites to the administrative decision in *Register v. Lloyd McCorkle Training School*, 92 N.J.A.R. 2d 697 (1992). In *Register*, the employee had voluntarily entered and successfully completed a substance abuse program. Upon learning of the employee's substance abuse, his employer terminated him from conduct unbecoming a public employee.

On appeal, the Merit System Board reinstated the employee to his position based on the fact that it was his *first* involvement with drugs. The Merit System Board also ruled that termination was inappropriate because the employee "*successfully completed the program and there was no evidence of subsequent drug use.*" *Id.* (emphasis added). Termination was ruled inappropriate because "the disciplinary charge of conduct unbecoming a public

employee did not arise from the employee's use, *possession or distribution of a drug on or off-duty.*" *Id.* (emphasis added).

In the present case, unlike in *Register*, O'Brien had already been given two opportunities at rehabilitation prior to the CDS possession which caused his termination. Moreover, *Cahill* and *Register* make it clear that under New Jersey law, once an employee has been given an opportunity for rehabilitation, his subsequent possession of a drug, on or off duty, warrants his termination.

The other administrative decision cited by O'Brien, *Troutman v. East Jersey State Prison*, 93 N.J.A.R. 2d 710 (CVS, 1993) is further supportive of Hackensack's action. In *Troutman*, the employee was terminated from his position for drug possession/use found to be conduct unbecoming a public employee. Despite the employee's denial of drug use or possession, and despite the fact the criminal charge of drug possession was dropped, the administrative judge found that the employee had been in possession of marijuana.

While recognizing the employee's prior unblemished work record as well as the concept of "progressive discipline", the Judge nevertheless

> Reject[ed] appellant's argument that the disposition of the administrative charges should be similar to the criminal charges . . . [W]here the conduct of a public employee forms the basis for disciplinary proceedings and also is a violation of the criminal law, failure to convict on a criminal charge bars neither discipline nor finding of guilt for misconduct in an administrative proceeding. *Sabia v. Elizabeth*, 132 N.J. Super. 6 [331 A.2d 620] (App. Div. 1975).

The foregoing opinion confirms that the termination of O'Brien's employment for drug possession was appropriate, irrespective of the fact that the criminal charges arising from such possession were resolved by the Municipal Court without reaching a determination as to his innocence or guilt on such charges.

Finally, contrary to O'Brien's argument (Pet., p. 21), the conduct of the termination hearing and its findings are not put into dispute simply because O'Brien alleges he "sought rehabilitation". As found by the courts below, the opportunities afforded O'Brien by Hackensack, including his right to a hearing, cannot be considered by any reasonable person to be either direct or circumstantial evidence of discrimination.

The simple fact remains that in December 1995, O'Brien, despite his acknowledged past drug use, possession and addiction, was again in possession of drugs. As was found by the courts below, Hackensack, responsible for the safety and welfare of its citizens, properly and lawfully terminated O'Brien as a firefighter not because of any disability but because his drug possession, coming on the heels of his prior suspension for admitted drug abuse, constituted conduct unbecoming a public employee.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied in its entirety.

Respectfully submitted,

RAYMOND R. WISS
Counsel of Record
THOMAS K. BOUREGY, JR.
WISS, COOKE & SANTOMAURO, P.C.
Three University Plaza
Suite 207
Hackensack, New Jersey 07601
(201) 488-1030
Counsel for Respondent

Dated: January 21, 2004

(3)

No. 03-906

Supreme Court, U.S.
FILED
MAR 19 2004
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

Richard O'Brien,

Petitioner

vs.

City of Hackensack

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING DENIAL OF PETITION FOR WRIT OF CERTIORARI

Michael P. Hrycak
Counsel of Record

Law Office of Michael P. Hrycak
316 Lenox Avenue
Westfield, New Jersey 07090
(908) 789-1870

INTRODUCTION

Petitioner asks this Court to consider the false and pretextual reasons asserted by a public employer after a course of discriminatory conduct against a rehabilitated employee to establish liability under the ADA for his wrongful termination and loss of career as a firefighter.

The employer decided to terminate O'Brien upon learning of his involvement with rehabilitation. The employee had no prior disciplinary record at the time he admitted his disability in January, 1995. However, by December, 1995 his employer found that after sixty days back on duty he "is again found to be in possession of a controlled dangerous substance" (Ja235). The only disciplinary record is one that was created in the meantime, including the arrest of O'Brien which was known ahead of time by the employer. From January, 1995 Hackensack discriminated against O'Brien solely due to his cross addiction disability, while he undisputedly stayed on the path of rehabilitation and sobriety.

A recently published New Jersey State Court opinion specifies that a public employee is entitled to a hearing if there is a material fact in dispute, including representation, cross-examination of adverse witnesses and presentation of witnesses on the employees behalf. Additionally, internal correspondence proves: (1) the employer never intended in honoring the parties' settlement agreement: (2) the employer knew beforehand of the arrest of the employee for the purpose of his subsequent termination; (3) an arrest warrant is still pending from this matter for failure to appear, although this matter was concluded before the March 27, 1997 disciplinary hearing and was at the core of employer's termination action.

Appendix A - Copy of Warrant to arrest Richard O'Brien, issued by Bergenfield Municipal Court for failure to appear for violation of N.J.S.A. 39:3-40 (Driving While Driver's License Suspended).

Appendix B1 - Interoffice Memorandum from Chief Richard Johnson to all Platoon Commanders, dated October 13, 1995.

Appendix B2 - Memorandum from Gordon A. Sieck, Personnel Director to Chief Richard Johnson, dated December 7, 1995.

Appendix B3 - Interoffice Memorandum from Chief Richard Johnson to Deputy Chief R. Yannelli, dated December 8, 1995.

Appendix C - Letter by Dr. C. Choi, dated December 10, 2003 diagnosing Richard O'Brien with PTSD related to past trauma as firefighter.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING FOR
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

O'BRIEN WAS DEPRIVED OF A PROPER HEARING BEFORE HIS EMPLOYER TERMINATED HIM SOLELY DUE TO HIS DISABILITY STATUS

A recently published opinion[1] by the Superior Court of New Jersey, Law Division has held that even for minor discipline[2] when a material fact is in dispute:

> the officer is entitled to representation, to cross-examine any witnesses who may be called to testify against him or her and to present witnesses on his or her behalf. A material fact is defined as a fact legally consequential to a determination of an essential issue in a case. Black's Law Dictionary 881 (5th ed. 1979). Where a material fact is an issue, it is essential that the hearing officer be afforded the opportunity to consider the testimony of witnesses and to have the testimony tested by cross-examination to determine where the truth lies. Such a procedure promotes confidence in the integrity of the process. Fraternal Order of Police Lodge #1 Camden v. City of Camden

[1] although decided October 22, 2003, this opinion was approved for publication February 9, 2004 and digested in the March 8, 2004 issue of New Jersey Law Journal, 175 N.J.L.J. 1020

[2] minor discipline consists of a fine or suspension of five days or less, the equivalent provision in this case is N.J.A.C. 4A:2-3.1(a) "Minor discipline is a formal written reprimand or a suspension or fine of five working days or less"

BEST AVAILABLE COPY

Police Department, ___ N.J.Super. ____ (Law Div., 2004) Lexis at 13, 14

The hearing officer in this matter decided O'Brien's termination only upon documentary evidence without a single fact witness: "I have reviewed the transcript. The proof of Firefighter O'Brien's guilt is overwhelming." Petition at 17, 18. The city's case was presented through one witness, Gordon Sieck, the personnel director (reply brief, page 5). His only testimony (March 27, 1997 transcript, pages 54-65) was to describe the Preliminary Notices of Disciplinary Action that he prepared. Then, the labor attorney, Raymond Wiss, read excerpts from the July 25, 1996 and November 5, 1996 municipal court transcripts into the record (pages 66-79), with Sieck's cross examination (pages 79-95) and redirect (pages 95-96). Mr. Sieck had no personal knowledge of O'Brien's arrest, municipal trial or whether he had been attending rehabilitation treatment or conditions of the dismissal of those charges (reply brief, page 5).

Mr. Sieck is also the author of the letter included as Appendix B2 which on December 7, 1995 advised the fire chief: "Mr. Naylis has advised me that the mechanics are in place for Richard [O'Brien] to be arrested by the Bergenfield Police Department this weekend for the possession of drugs. This arrest will eliminate Richard from any of the protection of the ADA he has enjoyed up to now." Appendix B2.

The employee is also entitled to "disclosure of the evidence..." Fraternal Order of Police, *supra*, at 12, citing Nicoletta v. N. Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 165 (1978). Richard O'Brien's legal counsel was presented with the Municipal Court transcripts thirty minutes before his disciplinary hearing on March 27, 1997, Petition at 17. These transcripts were stipulated to only on the condition that Officer Casper testify. The city refused to produce the witness after the transcripts were placed into evidence by the city manager LaCava.

The hearing officer used the transcripts of the proceeding to make findings regarding all the disputed facts: (1) the reason for the motor vehicle stop; (2) the arrest of O'Brien; and (3) the subsequent search of O'Brien's jacket leading to the alleged

discovery of the burnt marijuana stubs. Petition at 18.

O'Brien has disputed all three of these allegations. See Reply Brief, pages 4-7.

(1) O'Brien was stopped because Officer Casper of the Bergenfield Police Department suspected him of driving while suspended and outstanding warrants, Transcript of July 25, 1996 proceedings, Ja 214.

(2) Although the officer arrested O'Brien and issued a ticket for driving while suspended, Ja 223, that charge was dismissed, as well as no warrants were found. However, as Appendix A states, the driving while suspended warrant for arrest is still active today and being pursued by Bergenfield Municipal Court for the underlying matter that was concluded almost seven and a half years ago.

(3) Although the arresting officer testified, in the municipal court proceeding, that he searched O'Brien after arriving at the police station, there was a prior field search where O'Brien was directed to turn all his pockets inside out. Additionally, the officer searched his jacket, and all his garments, outside of his presence at the police station where the cigarette box with burnt marijuana butts were found. To this date O'Brien has never had these butts or the box presented, neither in the municipal court proceeding (although this evidence together with the station video monitor tape were subpoenaed but production was refused by the police-reply brief, page 6), nor at the disciplinary hearing. O'Brien was deprived his constitutional and lawful right to cross examine the police officer. Officer Casper's testimony at the municipal court hearing was accepted by the hearing officer.

HACKENSACK IMMEDIATELY RENEGED AFTER ENTERING INTO A SETTLEMENT AGREEMENT ON OCTOBER 13, 1995, WITH THE INTENT TO HAVE O'BRIEN DISMISSED DUE TO HIS ADDICTION

After the parties agreed to a settlement, first at an October 5, 1995 meeting (transcript Ja183-189), and confirming their respective responsibilities on October 13, 1995 (transcript Ja192-199), Fire Chief Richard Johnson, on that same day,

issued the following directive to his platoon commanders:

> As you are aware F/F O'Brien has been successful in his attempt to returne [sic.] to duty with this department. I will not allow this or any other drug addict on my Fire Department, I don't care how good a fire fighter he is. As of this moment I want all officer[s] to begin to file disciplinary charges against Mr. O'Brien for all presumed infractions of this Department[']s rules and regulations however minor an offense it may be. This disciplinary action must NOT fall under the protection of the americans with disabilities act. I want this individual off my department before Christmass[sic.] Appendix B1

Although at the time O'Brien had no knowledge of such a directive, it merely continued the course of discriminatory conduct by Hackensack since his plea for help with his disability in December, 1994. As his employer conceded, O'Brien had no disciplinary problems prior to this time:

> I accept further that Mr. O'Brien's personnel file is free of prior disciplinary problems, and that he has been trying to deal with his drug abuse problem by seeking medical help and therapy. I also accept that two recent drug tests were negative for drugs. City Manager LaCava April 18, 1995 findings, Ja165

By the time that Hackensack reinstated O'Brien in October 20, 1995; he had been kept off active status by the city for eleven months, since December, 1994. During the period of his suspension Hackensack attempted to charge him with conduct unbecoming a public employee (June 20, 1995). After a hearing on August 3, 1995 (which confirmed that all charges had been dismissed by the municipal court) on August 20, 1995 Hackensack alleged that O'Brien was not attending rehabilitation (for which no hearing was ever held). The October, 1995 settlement was agreed to by Hackensack only because O'Brien had filed an appeal and EEO complaint. The Third Circuit found that during this period Hackensack made no effort to fund or help with O'Brien's rehabilitation:

> The City agreed to help O'Brien secure and fund an

outpatient therapy program. However, the City later shifted the burden back to O'Brien to find outpatient treatment on his own. Petition, App. A, page 6.

Next, the upcoming arrest of O'Brien, on December 9, 1995 was confirmed by internal Hackensack correspondence, dated December 7, 1995. First, Sieck, personnel director, wrote a letter to Chief Johnson advising him that:

> Mr. Naylis has advised me that the mechanics are in place for Richard [O'Brien] to be arrested by the Bergenfield Police Department this weekend for the possession of drugs. This arrest will eliminate Richard from any of the protection of the ADA that he has enjoyed up to now.... When faced with the arrest in Bergenfield, the isolation from his children and the union, the harassment by Prisci in family court, and the arrests for child support by our friend in the sheriffs department. A drug addict with as serious an addiction problem as Richard had will return to the active use of drugs to deal with the stress. When this happens, Richard will kill himself with the drugs. If it is done this way no one will ask any question or even care. Appendix B2

However, it is the next two actions by Chief Johnson that make the December 9, 1995 arrest of O'Brien even more dubious. Initially, on December 8, 1995, Chief Johnson issued an interoffice communication to Deputy Chief Yannelli:

> Please be informed that as a result of F/F O'Brien's arrest by the Bergenfield Police for possession of CDS in a motor vehicle, F/F O'Brien is suspended from duty pending removal. This suspension will take effect immediately and as such F/F O'Brien is prohibited from entering any and all Fire Department facilities or having any contact with any employee of this Department. Appendix B3

This communication was issued on Friday, December 8, 1995, the day before the Saturday, December 9, 1995 arrest. It also reaffirmed the intent of isolating O'Brien from his fellow fire fighters and union members while he was fighting for his job

and career.

Next, the Fire Chief issued a Preliminary Notice of Disciplinary Action based upon conduct unbecoming a public employee for possession of CDS in motor vehicle and insubordination and failure to comply with order, reply brief, page 10. This notice was issued on the Monday morning, December 11, 1995 following the Saturday night arrest. These actions, both individually and collectively, support an intent to terminate O'Brien for his addiction, contrary to the finding of the Third Circuit:

> No one could reasonably conclude, on this record, that O'Brien was terminated for his addiction, rather than for the misconduct of drug use and possession. Petition, App. A, page 7

Hackensack's actions support a finding of O'Brien's termination due to his addiction, thereby satisfying the requirements for a prima facie case under the ADA.

O'BRIEN HAS RECENTLY BEEN DIAGNOSED WITH PTSD RELATED TO HIS EXPERIENCE AS A FIRE FIGHTER, CONFIRMING HIS DISABILITY STATUS

After the petition was filed with this Court, O'Brien was diagnosed at the Veterans Affairs Medical Center in Philadelphia, Pennsylvania with Post Traumatic Stress Disorder (PTSD), directly related to "past trauma as a firefighter" Appendix C. Richard O'Brien has qualified for Veterans Affairs treatment due to his prior service in the United States Navy. However, the physician concluded on December 10, 2003 that O'Brien is under her care due to PTSD.

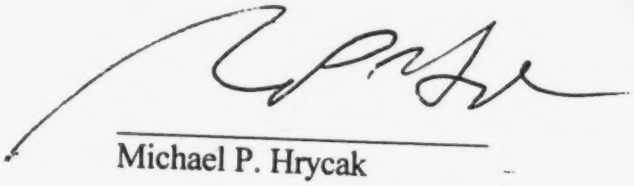
For the first time this may explain Richard O'Brien's cross addiction for which the protection of the ADA is sought. It is respectfully submitted on rehearing that a plaintiff must be accorded a full and fair opportunity to present the underlying facts to establish wrongful termination by an employer due to an employee's disability. This case underscores the special problem being faced by first responders, they are public employees that cannot be terminated except for cause.

However, when the circumstances of their duties cause, or contribute, to the existence of a disability such as O'Brien's, they need to be able to approach their employers for assistance. Otherwise, we will lose these important members that selflessly and regularly are depended upon by the public to help and rescue them from disasters, natural and manmade. This discrimination concluded with a hearing that was inadequate even for minor discipline, but it terminated a career. O'Brien, like many others that have not been able to avail themselves of the ADA for protection, continue to live a substandard life as a result of this discrimination that will not end without their chance to vindicate themselves and their actions in an adjudicative proceeding. Otherwise, they have lost everything, as O'Brien has.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



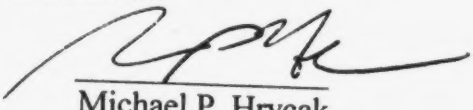
Michael P. Hrycak

Dated: March 19, 2004

Certification IAW Supreme Court Rule 44.2

I, Michael P. Hrycak hereby certify that this petition for rehearing is restricted to intervening circumstances or other substantial grounds not previously presented and is presented in good faith and not for delay. I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 19, 2004



Michael P. Hrycak

TFF00169

****
* C O P Y O F W A R R A N T *
****

02/21/01
07:30

WARRANT NO: 37836
TICKET NO: 037836

POLICE AGENCY: 0203
BAIL AMOUNT: 500.00
DATE WARRANT ISSUED: 02/07/2001

M/C PHONE #: 201 387-4055
VIOLATION: 39:3-40

TO ANY POLICE OFFICER:
YOU ARE HEREBY COMMANDED TO ARREST THE DEFENDANT WHOSE NAME AND ADDRESS ARE SHOWN BELOW AND BRING HIM/HER BEFORE THIS COURT TO ANSWER A COMPLAINT(S) CHARGING AN OFFENSE(S) IN THE JURISDICTION OF THIS COURT OR HOLD THE DEFENDANT TO BAIL BEFORE AN AUTHORIZED OFFICIAL IF AN AMOUNT OF BAIL IS SHOWN ABOVE.

RICHARD OBRIEN
140 HIGHGATE TERR

BERGENFIELD NJ 07621 3922

DLN: 010676550007574
DOB: 07/00/1957 EYES: A SEX: M

BY ORDER OF JUDGE
LYNN S MULLER
BERGENFIELD
198 N WASHINGTON AVE

BERGENFIELD NJ 07621

AUTHORIZED BY
LYNN A JACOBY

REASON FOR WARRANT: FAILURE TO APPEAR
PF1 - EXECUTE WARRANT PF2 - WARRANT HISTORY

Appendix A

BACKENSACK FIRE DEPARTMENT

OFFICE OF THE CHIEF

TO: All Platoon Commanders

FROM: Fire Chief Richard Johnson

DATE: October 13, 1998

SUBJECT: Fire Fighter O'Brien

As you are aware F/F O'Brien has been successful in his attempt to returne to duty with this department. I will not allow this or any other drug addict on my Fire Department, I don't care how good a fire fighter he is. As of this moment I want all officer to begin to file disiplinary charges against Mr. O'Brien for all presumed infractions of this Departments rules and regulations however minor an offense it may be.This disciplinary action must NOT fall under the protection of the americans with disabilities act. I want this individual off my department before Christmass.

By Order of
Richard Johnson, Chief
Commanding

Deputy Chief R. Carucci
Deputy Chiefs 1, 2, 3, 4
Information Management

Appendix B1

CITY OF HACKENSACK
65 Central Avenue
P.O. Box 608
HACKENSACK, N.J. 07602-0608
(201) 646-3905
Fax # (201) 646-8032

GORDON A. BIECK
EXECUTIVE ASSISTANT
PERSONNEL DIRECTOR

CITY COUNCIL
JOHN P. ZISA, MAYOR
JUANITA TRANSHILL
DEPUTY MAYOR
MARK A. STEIN
ROGER S. MATTEI
JOSE R. GALVIS

December 7, 1995

Mr. Johnson:

Karen has informed me that Mr. Jordan and company has made another attempt to scare Mr. O'Brien away by having him ruffed up. I have also been informed that this latest attempt erupted into an extremely violent confrontation in which all three of the thugs sent after Mr. O'Brien received serious injuries. This development is both dangerous and unnecessary. I will again echo Prisci's warnings about pushing Richard into any physical confrontation, (Rick is an extremely dangerous man when pushed into a fight, he grew up on the streets and is an exceptional street fighter), this mans ability to fight is augmented by several years of studying martial arts. These attempts to scare Mr. O'Brien off are dangerous and stupid and must cease immediately.

Mr. Naylis has advised me that the mechanics are in place for Richard to be arrested by the Bergenfield Police Department this weekend for the possession of drugs. This arrest will eliminate Richard from any of the protection of the ADA that he has enjoyed up to now. Mr. Jordan needs to focus his attention to the task of eliminating any of Richard's support within the union and to ensure that his friend Johanna continues to prevent Richard and Prisci from communicating. Richard must not be permitted to establish Prisci's personal involvement with any employee of this City.

When faced with the arrest in Bergenfield, the isolation from his children and the union, the harassment by Prisci in family court, and the arrests for child support by our friend with the sheriffs department. A drug addict with as serious an addiction problem as Richard had will return to the active use of drugs to deal with the stress. When this happens, Richard will kill himself with the drugs. If it is done this way no one will ask any question or even care.

Gordon A. Bieck
Executive Assistant/
Personnel Director

Appendix

BC

CITY OF HACKENSACK

INTEROFFICE COMMUNICATION

DATE: December 8,1995

MEMO TO: Deputy Chief R. Yannelli

FROM: Richard Johnson, Fire Chief

SUBJECT: Fire Fighter R.O'Brien

Please be informed that as a result of F/F O'Brien's arrest by the Bergenfield Police for possession of CDS in a motor vehicle,F/F O'Brien is suspended from duty pending removal.This suspension will take effect immediately and as such F/F O'Brien is prohibited from entering any and all Fire Department facilities,or having any contact with any employee of this Department

RJ:daj

CC: Gordon Sieck, Executive Asst/Personnel Dir
Russell Shorter, President IAFF Local 2081

Appendix B3

B3

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
University and Woodland Avenue
Philadelphia PA 19104

In Reply Refer To

To whom it may concern; 12/10/03

This is to inform you that Mr. Richard OBrien (soc sec 135-56-8102) is under my care at the Philadelphia VA Hospital Mental Health Clinic for a diagnosis of PTSD related to past trauma as a firefighter. Although this is Not a service-connected condition, Mr. O'Brien is totally disabled and unemployable due to this diagnosis and may be eligible for a non-service connected pension.

I would appreciate any help that you may provide this veteran

Sincerely,

C. Choi, MD
(215) 823-4053

Pa license MD 040446 E

Appendix C